

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 EUGENE DIVISION

4 ELIZABETH HUNTER, et al., )

5 Plaintiffs, )

6 v. )

7 U.S. DEPARTMENT OF EDUCATION, )  
8 et al., )

9 Defendants. )

10 v. )

11 COUNCIL FOR CHRISTIAN )  
12 COLLEGES & UNIVERSITIES, )  
13 WESTERN BAPTIST COLLEGE d/b/a )  
14 CORBAN UNIVERSITY, WILLIAM )  
JESSUP UNIVERSITY, AND )  
PHOENIX SEMINARY, )

15 Defendants-Intervenors. )  
16  
17  
18

19 PRELIMINARY INJUNCTION HEARING

20 VOLUME 2

21 TRANSCRIPT OF PROCEEDINGS

22 BEFORE THE HONORABLE ANN L. AIKEN

23 UNITED STATES DISTRICT COURT JUDGE  
24  
25

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1 THE COURTROOM DEPUTY: Now's the time set for Civil  
2 Case No. 21-474, Hunter, et al. v. U.S. Department of  
3 Education, et al. for preliminary injunction hearing. If you  
4 could please introduce yourselves for the record beginning with  
5 Plaintiffs.

6 MR. SOUTHWICK: Paul Southwick for Plaintiffs.

7 DR. WOLFF: Joshua Wolff for Plaintiffs.

8 THE COURTROOM DEPUTY: For Defendants?

9 MS. SNYDER: This is Hilarie Snyder and Carol  
10 Federighi for Defendants, Your Honor.

11 THE COURT: Okay. That's a very difficult sound  
12 system for you, Ms. Snyder, just to note. I'm not hearing you  
13 very loudly. It's muffled.

14 MS. SNYDER: Not still?

15 THE COURT: It's a tiny bit better.

16 MS. SNYDER: (Indiscernible.)

17 THE COURT: That's not good. Sorry.

18 MS. SNYDER: Okay. We can, again, try to dial in  
19 with a phone if that's a better system for the Court. We were  
20 just getting muted yesterday I think inadvertently.

21 THE COURT: I don't have a problem -- I'm just -- I'm  
22 giving you that heads-up because we're just going through  
23 introductions, and we're going to start with the Plaintiffs'  
24 expert, and so we won't probably get to you for a little bit.  
25 So I just wanted to give you a heads-up that that was an issue.

1 Okay?

2 MS. SNYDER: Thank you, Your Honor.

3 THE COURT: Mm-hm.

4 MR. SOUTHWICK: Your Honor, this is Paul Southwick.  
5 We're hearing some significant background noise. I'm not  
6 sure --

7 THE COURT: I think people are introducing themselves  
8 and they haven't gone on mute. So maybe once everyone gets  
9 introduced, then we can have people mute, and then it should  
10 take the background noise out. So let's continue. We've  
11 finished with Ms. Snyder. Let's move from Ms. Snyder to the  
12 Intervenors.

13 MR. SCHAERR: Yes, Your Honor. This is Gene Schaerr  
14 for Intervenor CCCU. And I'm joined today by Nick Miller and  
15 Joshua Prince and Herb Grey.

16 MR. LIPPELMANN: Good morning, Your Honor. This is  
17 Mark Lippelmann for the Religious School Intervenors as well.

18 MR. TUCKER: Ryan Tucker for the Religious School  
19 Intervenors. But Mark Lippelmann will be doing today.

20 THE COURT: All right. Now, if everyone would mute  
21 except Mr. Southwick. And you -- if you'd go ahead and call  
22 your next.

23 MR. SOUTHWICK: Thank you, Your Honor. This is Paul  
24 Southwick. And Plaintiffs call their next witness --  
25 Dr. Joshua Wolff. And I believe Dr. Wolff is here on the

1 screen.

2 THE COURT: If he says --

3 MR. SOUTHWICK: I think he's gone.

4 THE COURT: If he just speaks at all, he'll pop up.

5 DR. WOLFF: Good morning. Can you hear me?

6 THE COURT: Are you Dr. Wolff?

7 DR. WOLFF: Yes.

8 THE COURT: All right. So please raise your right  
9 hand. And, again, if everyone would put their phones or their  
10 systems on mute, I would appreciate it.

11  
12 JOSHUA RICHARD WOLFF, Ph.D.,  
13 called as a witness, having been first duly sworn, testified as  
14 follows:

15  
16 THE COURT: Thank you. Please state your full name  
17 and spell your last for the court reporter.

18 DR. WOLFF: Joshua Richard Wolff; last name is  
19 spelled W-O-L-F-F.

20 THE COURT: Thank you.

21 Go ahead, Mr. Southwick.

22  
23 DIRECT EXAMINATION

24 BY MR. SOUTHWICK:

25 Q Good morning, Dr. Wolff. Thank you for being here today.

1 A Good morning.

2 Q And I believe -- are you coming to us from the Chicago  
3 area this morning?

4 A Yes. Yes, I am.

5 Q Great. And can you just tell us where you are currently  
6 employed or any institutional affiliations that you currently  
7 have?

8 A Sure. I'm currently employed at Adler University in  
9 Chicago as an adjunct professor, and I also am employed as a --  
10 my own private practice where I see patients for psychological  
11 and neuropsychological evaluations. I'm a licensed clinical  
12 psychologist in the state of Illinois.

13 Q Great. And is it your understanding today that you are  
14 here primarily as an expert witness to provide expert testimony  
15 related to the report that you have provided, but that you'll  
16 also be providing some fact witness testimony? Is that your  
17 understanding?

18 A That is my understanding.

19 Q All right.

20 MR. SOUTHWICK: So just for the Court and counsel, I  
21 intend to go through Dr. Wolff's expert testimony first, and  
22 then it will be a fairly brief fact witness section that I'll  
23 reserve for the end.

24 THE COURT: All right.  
25



1 BY MR. SOUTHWICK:

2 Q All right, Dr. Wolff. So I just want to ask you some --  
3 a bit more about your background and credentials before we move  
4 into the heart of your report. Let's --

5 A Okay.

6 Q -- go ahead and start more from the beginning. What  
7 degrees do you have from undergrad and any graduate degrees?

8 A Sure. So I have a bachelor's of science in psychology  
9 from the University of Wisconsin-Stevens Point. I have a  
10 master of arts in clinical psychology from Biola University. I  
11 have a doctor of philosophy Ph.D. in clinical psychology from  
12 Biola University. And I completed my post-doctoral fellowship  
13 at Harvard Medical School in the Department of Pediatrics.

14 Q Wonderful. And when did you obtain your Ph.D.?

15 A 2009 -- yep -- August 2009.

16 Q And then I'd like to go ahead and introduce your expert  
17 report just because it can kind of help guide the Court and us  
18 today during the discussion. So I have --

19 A Sure.

20 MR. SOUTHWICK: I'll share my screen here with folks.  
21 And I'd like to introduce Dr. Wolff's expert report as  
22 Plaintiffs' Exhibit No. 17. Any objections?

23 THE COURT: Hearing none, it will be received. Have  
24 it marked.

25 MR. SOUTHWICK: Great.

1 BY MR. SOUTHWICK:

2 Q All right. Dr. Wolff, are you able to see this report I  
3 pulled up --

4 A Yes.

5 Q -- or have a copy handy yourself?

6 A Yes.

7 Q Okay.

8 A Yes.

9 MS. SNYDER: Your Honor, I'm sorry.

10 THE COURT: Wait.

11 MS. SNYDER: Your Honor, I'm sorry to interrupt. We  
12 hit the button. I'd just like to -- for the record, the  
13 Government does object to the report on the basis of hearsay.

14 THE COURT: And, Ms. Snyder, this is exactly why I  
15 said you need to fix your sound. I can barely hear you. And  
16 it's not going to be helpful, because I can't hear you. So I  
17 guess I think I heard you're going to object on the basis of  
18 hearsay is the essence of what I heard. Is that accurate?

19 MS. SNYDER: That is accurate, Your Honor. And,  
20 again, I apologize. We're working to fix it right now.

21 THE COURT: Yeah, it's -- thank you. Noted for the  
22 record. Move on.

23 MS. SNYDER: Thank you, Your Honor.

24 MR. SOUTHWICK: So, Your Honor, just so we have a  
25 clear record, is the report --

1 THE COURT: I already received it. It's received.  
2 The objection's noted. The report's received.

3 MR. SOUTHWICK: Thank you. I'm getting an echo now.

4 DR. WOLFF: Same.

5 MR. SOUTHWICK: Everyone's echoing.

6 THE COURT: Ironically we're not. Usually we always  
7 have the first complications, but we're not. But I can't hear  
8 Ms. Snyder.

9 THE COURTROOM DEPUTY: Can you ask everyone else to  
10 mute?

11 THE COURT: Could everybody besides Mr. Southwick  
12 please mute and see if that doesn't help?

13 MR. SOUTHWICK: All right. Trying this again. Well,  
14 I'll go ahead and -- I'm still getting it.

15 THE COURT: Do you want to try to call back in?

16 MR. SOUTHWICK: Yeah, let me try that. Sorry, Your  
17 Honor.

18  
19 (A break was taken from 9:16 AM to 9:16 AM.)  
20

21 THE COURT: All right. Let's pick up where we were.

22 MR. SOUTHWICK: All right.

23 BY MR. SOUTHWICK:

24 Q Sorry about that, Dr. Wolff. Thank you --

25 A No problem.

1 Q -- for bearing with us with the technology issue. So we  
2 were going through some of your academic credentials. And then  
3 I wanted to ask what has your field of research been since you  
4 obtained your Ph.D. in 2009?

5 A Sure. My research has covered a few different areas, but  
6 it is mostly focused on LGBTQ experiences, mental health  
7 particularly as it pertains to those with religious identities,  
8 students in religious higher education, and other variables  
9 related to overall well-being and health factors for LGBT  
10 individuals.

11 Q And have you published peer-reviewed academic research in  
12 this field?

13 A Yes. I believe I included at least five in my reference  
14 section. But, yes, I have published multiple research studies  
15 in this field, which have been peer reviewed and a reputable  
16 publisher such as the American Psychological Association.

17 Q Wonderful. And have you served on any government task  
18 forces or government committees as an expert or as a  
19 psychologist in some capacity?

20 A I have. I served as a scientific expert on President  
21 Obama's task force on ending conversion therapy for LGBTQ  
22 youth, which was commissioned through SAMHSA, which is the  
23 Substance Abuse and Mental Health Services Administration,  
24 which is part of the U.S. Department of Health and Human  
25 Services. I've also been a grant reviewer on two suicide

1 prevention initiatives as well as pediatric trauma prevention  
2 initiatives through SAMHSA as well.

3 Q Great. Just as a little definitional thing before we move  
4 on -- because we'll probably talk about it a little bit later  
5 as we dive into your report -- but --

6 A Okay.

7 Q -- could you give just kind of a lay definition of  
8 conversion therapy and what that means in the context of sexual  
9 and gender minorities?

10 A Sure. I used the term "conversion therapy" because it's  
11 more commonly known. However, that term is very disfavored  
12 among psychologists and psychiatrists, because it's very  
13 debatable if that's really a form of therapy or not.

14 The APA -- both the APAs -- the American Psychological  
15 Association and the American Psychiatric Association have taken  
16 strong positions that efforts to change someone's sexual  
17 orientation or gender identity -- that's what I mean by  
18 "conversion therapy" -- that these are not only not effective,  
19 they can actually be quite harmful.

20 Q And in your experience, or in the literature, can  
21 conversion therapy -- or a form of it -- can that be practiced  
22 in both a clinical setting and in nonclinical settings?

23 A It can be practiced in both. Yes. And that's actually --  
24 many states that have passed laws that ban conversion therapy  
25 that may be only limited to minors or with licensed medical

1 professionals -- oftentimes those restrictions, in my  
2 understanding, do not apply in nonclinical settings.

3 Q Great. And --

4 A But certainly if I were -- oh, I'm sorry.

5 Q No, go ahead.

6 A Oh. You know, very likely, if a licensed psychologist in  
7 most states were to practice conversion therapy, they would be  
8 very much at risk of losing their license or facing  
9 disciplinary consequences from that state licensing board.

10 Q Thank you for that that clarification. And we'll go into  
11 some of the specifics a little bit more further on in your  
12 report. But I just kind of wanted to frame things so we all  
13 have a shared language today.

14 Going through just a little bit more of your background, I  
15 see that you were appointed as a fellow of the APA last year.  
16 Could you tell the Court a little bit about what that means?

17 A Sure. Fellow is a membership status. It is considered  
18 the highest level of membership status. It is a big honor to  
19 be given that, especially earlier -- someone relatively early  
20 in their career. That award was given by the APA specifically  
21 for my research on LGBTQ people in religious environments,  
22 particularly in religious higher education.

23 And that award is then -- that award is you are nominated  
24 by a division of the APA, which is done -- submits a  
25 recommendation to a committee at the APA. And then it is

1 reviewed by the board of directors by APA, must be approved  
2 there, and then that nomination goes to the entire counsel of  
3 the APA for approval, which is 200-some members of that  
4 leadership group. I don't know the exact number. I'd be happy  
5 to get that to the Court if you would like that.

6 Q Great. No, I think that's sufficient. And you mentioned  
7 being nominated by a division. It looks like you have some  
8 significant experience with APA Division 44. And could you  
9 tell the Court about that?

10 A Sure. Division 44 is the Society for the Psychology of  
11 Sexual Orientation and Gender Diversity. I refer to it as  
12 Division 44. It's just shorter and easier to say. But that is  
13 the full name of the division. APA membership is constituted  
14 as being a member of APA, and then many psychologists are also  
15 members or separately members of the different divisions, which  
16 are all officially part of the APA as well.

17 Q Great. Thank you. So when we refer to Division 44 today,  
18 that's what we'll be talking about. All right. And I just  
19 want to point to your expert report. On the blue-stamped  
20 version -- it's page 5 -- and up here -- the first paragraph  
21 after the subheading "h" -- the report states that "I was  
22 retained by Paul Southwick Law, LLC" -- my law firm -- "to  
23 provide opinions on LGBTQ+ students' experiences at  
24 non-affirming religious colleges and universities." So  
25 NARUs -- if we use that -- throw that term around -- that's

1 what we're talking about today. And then you note the  
2 compensation you received and what you reviewed. So is this  
3 essentially the scope of the expert witness testimony that you  
4 intend to provide to the Court today?

5 A Yes, that is my understanding.

6 Q Great.

7 MR. SOUTHWICK: So at this point, Your Honor, I'd  
8 like to move to qualify Dr. Wolff as an expert witness within  
9 the scope of his report as stated here today.

10 THE COURT: Any objections or follow-up questions?

11 MS. SNYDER: No objection from the Defendants, Your  
12 Honor.

13 MR. MILLER: No objections from the Intervenors.

14 THE COURT REPORTER: Who was that?

15 THE COURT: Okay. Again, I'm going to ask you -- the  
16 court reporter just said to me, "Who was that?" So please  
17 state your name when you speak, because it isn't necessarily  
18 obvious to the court reporter.

19 MR. MILLER: This was Nicholas Miller for Intervenor  
20 CCCU.

21 MR. LIPPELMANN: And this is Mark --

22 MS. SNYDER: This is Hilarie Snyder, Your Honor, for  
23 the Federal Defendant.

24 MR. LIPPELMANN: And this is the Mark Lippelmann for  
25 the Religious School Intervenors. No objection.



1 THE COURT: It will be received, and he'll be  
2 designated an expert, and we'll move forward on the document.

3 MR. SOUTHWICK: Great.

4 BY MR. SOUTHWICK:

5 Q Thank you, Dr. Wolff. All right. So we've gone through  
6 your background and qualifications, and we've discussed the  
7 scope of the testimony you're going to be providing today. And  
8 we've also admitted your expert report. And so I'm not going  
9 to go through each and every paragraph of your expert report.  
10 It's available to the Court. It is in the record. But there  
11 are several aspects of it that I'd like to ask you some  
12 questions about and have you provide some further explanation.

13 I'm getting background -- okay. I was hearing some  
14 background noise again, but I think it's minimal.

15 All right. Well, I want to start with the findings  
16 section. And this is on page 6 of the blue-stamped copy. And  
17 I'll scroll down on the screen. All right. And so, Dr. Wolff,  
18 are you here at the section which is the "Findings" heading?

19 A Yes, I am.

20 Q Okay. Great. And so, in this section, you talk about  
21 some of the previous research on campus climate for LGBTQ+  
22 students. And so I just want to ask you some questions about  
23 this. Sounds like that, prior to your own research, there is a  
24 body of research out there on the mental health outcomes and  
25 campus climate for LGBT students in the general college student

1 population. And so I was hoping maybe you could talk to the  
2 Court a little bit about some of the prior research in terms of  
3 the general student population that is out there.

4 A Sure. I'd be happy to speak to that broadly. And, of  
5 course, if there's more specific parts of that, I can dive into  
6 that as well. But, yes, there are decades' worth of research  
7 on LGBTQ student experiences in higher education. And I'm  
8 saying "higher education" broadly. And I'm not speaking  
9 specifically to religious education right now.

10 But much of that research shows various types of health,  
11 educational, and campus climate disparities. For example, for  
12 health disparities, LGBTQ students show higher rates of  
13 depression. LGBTQ students, particularly transgender students,  
14 show higher rates of suicidal ideation, which is a clinical  
15 term for thoughts about having suicide -- about suicide or  
16 self-harm.

17 In academic disparities, you see research supporting lower  
18 completion rates -- lower GPAs from LGBTQ students --  
19 particularly if they don't feel safe on campus or don't feel  
20 supported with the larger campus climate. And you also see  
21 campus climate disparities. That they report being more likely  
22 to be bullied, harassed, assaulted than their heterosexual or  
23 cisgender peers. And by "cisgender," I mean people that their  
24 gender identity aligns with the sex that they were assigned at  
25 birth.

1 Oh, I'm sorry, I can't hear you.

2 Q Oh. Thank you, Dr. Wolff.

3 MR. SOUTHWICK: I'm sorry to raise this again, but  
4 are people getting an echo, or is this just me getting an echo?

5 THE WITNESS: Yeah.

6 MR. SOUTHWICK: Everyone's hearing the echo. Okay.

7 THE COURT: We're not.

8 MR. SOUTHWICK: You're not. All right. Well, the  
9 Judge is not, so we can bear with it. All right.

10 THE COURT: No, no, no. I'm worried about that. But  
11 I don't know how to -- how, from our end, we can fix that.

12 MR. SOUTHWICK: For the court reporter, Jill, are you  
13 able to hear okay?

14 THE COURT: We have a different court reporter today.

15 THE COURT REPORTER: They can't hear me.

16 THE COURTROOM DEPUTY: It's Kendra and she can hear.

17 THE COURT: She's actually in the courtroom. Our  
18 court reporter yesterday was remote. I can hear an  
19 undercurrent of noise. So...

20 THE COURTROOM DEPUTY: I think Zak is working on it.  
21 He's hearing it too.

22 THE COURT: Apparently our crack IT tech is working  
23 on it from our end, but I'm not sure.

24

25 (A break was taken from 9:31 AM to 9:35 AM.)

1  
2 THE COURT: All right. So like the Rubik's Cube is  
3 now aligned.

4 MR. SOUTHWICK: All right.

5 THE COURT: Go ahead.

6 BY MR. SOUTHWICK:

7 Q All right. Dr. Wolff, apologies again. The joys of  
8 remote hearings in the times of COVID. So we appreciate your  
9 patience with us.

10 A No problem.

11 Q So we're just starting to dive into some of the findings  
12 in the report. And --

13 MR. SOUTHWICK: Hm, wow, it is really hard with this  
14 echo. Are people still hearing the echo or -- yeah. Okay.

15 Your Honor, I can try, but it is really distracting for  
16 me.

17 THE COURT: No, I hear you. I know Zak's working on  
18 it. There's -- I can't --

19 MR. SOUTHWICK: Now we can't hear you. Should we  
20 take a little recess and come back?

21 THE COURT: Let's take a break. And that way  
22 everybody has to at least sign back in and leave Zak a minute  
23 to work on it.

24 MR. SOUTHWICK: Okay.

25 THE COURT: All right.

1 MR. SOUTHWICK: Okay. Thank you.

2 THE COURT: Thanks.

3

4 (A break was taken from 9:36 AM to 9:48 AM.)

5

6 THE COURT: Mr. Southwick, let's continue. And I  
7 believe we were talking about the report. And you were talking  
8 through the findings. So go right ahead. Pick up.

9 So maybe they didn't hear me?

10 THE COURTROOM DEPUTY: Okay. Now you're on.

11 THE COURT: All right. Can you hear the Court?  
12 Okay, good. I think we're ready to go.

13 MR. SOUTHWICK: Yes.

14 THE COURT: Zak's sticking around a little bit.  
15 Happy there's -- the echo is gone. Until there's another  
16 problem, we'll just carry on. And you were talking through the  
17 findings with your expert Dr. Wolff. So why don't pick back up  
18 where you were.

19 MR. SOUTHWICK: Sure, happy to do that. But the echo  
20 is now back. I think it's coming from the courtroom.

21 THE COURT: Well, if you could -- you could put me on  
22 mute, and then I can alert Cathy if I need to say anything. If  
23 that helps, I don't have a problem with that.

24 MR. SOUTHWICK: Okay.

25 THE COURT: Zak, can that work?

1 MR. MOWER: Yeah. We can do that then.

2 THE COURT: Okay. And, Cathy, you'll just have to  
3 keep an eye on me.

4 MR. SOUTHWICK: Zak or Cathy, could one of you let us  
5 know when that's ready?

6 MR. MOWER: Go ahead and proceed. We're going to  
7 mute that now.

8 MR. SOUTHWICK: Thank you.

9 BY MR. SOUTHWICK:

10 Q All right. Dr. Wolff, we are back at it once again. So  
11 let me go ahead and share my -- get my screen share back up so  
12 we have your report handy, which I should be able to do. There  
13 we go. All right. Once again we are looking at Dr. Wolff's  
14 expert report, which is Plaintiffs' Exhibit No. 17. And we are  
15 back on the record.

16 All right. Dr. Wolff, so we were just starting to get  
17 into some of the general research that preexisted the work that  
18 you had done and that has augmented some of the research you  
19 have done and about the general student population. I know we  
20 were just starting to get into that. But I'd like to turn to  
21 page -- let's see -- we are at page 6 of the blue line -- let's  
22 see -- maybe it would be most helpful -- I'm referring to the  
23 blue-line pages at the top. If that is too confusing, let me  
24 know.

25 A It's a little confusing. Is it possible to also let me

1 know on the bottom right-hand corner the page numbers that I  
2 put in?

3 Q Yes.

4 A Thank you.

5 Q Yeah. I'll switch to that, because that might be easier  
6 for everyone.

7 A Okay.

8 Q All right. So we were looking at Wolff Statement page  
9 4 --

10 A Okay.

11 Q -- bottom right. So I'm going to scroll down to page 5.  
12 And I just wanted to ask if we could get into some of the  
13 mental health disparities. If you could give some specific  
14 examples of mental health or other disparities regarding  
15 harassment, discrimination -- those kinds of things -- if you  
16 could talk about some of the specific ones.

17 A Sure. So one of them -- and a significant number of  
18 research mentioned this -- is isolation. Feeling like you  
19 don't fit in, feeling like you may be rejected, judged,  
20 experience peer rejection -- that certainly is a risk factor  
21 for developing conditions like depression.

22 And I think it's important just to also let the Court know  
23 that when I -- sometimes I will use terms like "depression"  
24 that may not mean that someone would meet, for example, a full  
25 diagnostic criteria for depression that the psychiatrist would

1 use. But someone can have symptoms of depression or symptoms  
2 of anxiety even if they don't meet full diagnostic criteria.

3 So isolation is a significant factor. Also a significant  
4 factor is much more overt -- physical assault, bullying -- you  
5 know, being -- hearing slurs in a dorm room, in a locker room,  
6 at the gym, in the hallway. There's, again, a large body of  
7 research to say that LGBTQ students are more likely to  
8 experience that at many campuses, again, not just at religious  
9 campuses.

10 Q Thank you for that explanation -- the specific things that  
11 students are hearing. And the plaintiffs in this case have  
12 described a number of those experiences in their declarations  
13 in the complaint and then testimony earlier.

14 I also wanted to draw the Court's attention to a statement  
15 towards the end of this paragraph where you talk about students  
16 with multiple minority identities and the amplified  
17 difficulties there. If you could speak to that a little bit.

18 A Sure. So to say that it's the same for all LGBTQ people  
19 would -- that's not true. It's, you know, an obvious  
20 overgeneralization, but there are -- the research says that  
21 there are differences, and that individuals who hold multiple  
22 minority identities -- and the way that we define that as  
23 psychologists is minority identities means that groups who have  
24 been historically marginalized in the United States.

25 For example, that can be due to race, that can be due to



1 disability status, that can be due to sexual orientation,  
2 gender identity. But that those individuals are particularly  
3 at risk. So, for example, I noted there a black, lesbian  
4 female; a transgender individual who is neurodiverse or has a,  
5 you know, physical or sensory disability. Those are often --  
6 not always -- but often the people who are at greatest risk for  
7 some of these disparities that I've mentioned at college  
8 campuses.

9 Q And in addition to these specific disparities that you  
10 were talking about, on the next paragraph of your report you  
11 talk about the concealment of identity and students needing to  
12 hide. And it looks like there's some data on this that  
13 predates your research. So if you can kind of summarize that a  
14 little bit and then maybe specifically address how concealment  
15 manifests itself at non-affirming religious educational  
16 institutions as well.

17 A Sure. So one of the things that researchers have tried to  
18 do is -- in addition to noting that there are these increased  
19 rates of things like depressive symptoms, anxiety symptoms --  
20 is to try to figure out why and to do so statistically by  
21 parsing out different types of explanations, or variables, as  
22 we would call them in a statistical analysis.

23 So these authors that are cited here on this page have  
24 done that kind of work. And one of the conclusions is that for  
25 some people a culprit is that feeling of having to conceal, to

1 hide, to isolate, to withdraw. That that may be, for many  
2 students, one of the biggest risk factors for whether or not  
3 they're going to develop mental health symptoms or have some of  
4 those other adverse academic outcomes that I mentioned earlier  
5 such as, you know, lower GPAs, not doing well in classes,  
6 perhaps ultimately withdrawing.

7 Q And would you expect this concealment factor to be present  
8 especially in a college environment where queer or trans  
9 identities are penalized and where there are no  
10 nondiscrimination protections? Would you expect to see a  
11 greater need for concealment in those kind of environments?

12 A Yes. And that was supported by -- particularly by the  
13 2017 study that is cited in my testimony where we did  
14 qualitative interviews with transgender, nonbinary students who  
15 attended non-affirming religious universities who -- that is  
16 exactly what they said. Many of them concealed their  
17 identities, were afraid to come out. Or, when they did talk  
18 about it in class, they felt ridiculed. They felt bullied by  
19 faculty or staff. So they went back in the closet. They hid  
20 it again out of that fear of rejection, that fear of  
21 retaliation.

22 And so, qualitatively, the studies that cited -- as well  
23 as the study that -- the 2017 study by Shelley Craig, which is  
24 also in my testimony, where they interview I believe over 200  
25 students -- LGBTQ students -- at the types of -- at religious

1 colleges -- and found similar results in terms of hiding who  
2 you are and that that takes a -- can be very detrimental to  
3 some students.

4 Q And, in fact, on this paragraph here you talked about how  
5 concealment, harassment, and stigma are associated not only  
6 with isolation but can actually have academic consequences as  
7 well --

8 A Yes.

9 Q -- in terms of disengagement and lower GPA; is that fair  
10 to say?

11 A Yes. That's what the research shows.

12 Q And just a little bit ago you were talking specifically  
13 about concealment amongst transgender and gender nonconforming  
14 students. So I would like to take you to the next page --  
15 Wolff Statement page 6 -- and that top paragraph -- how you  
16 explained that, prior to 2010, most of the research focused on  
17 sexual minority students rather than --

18 A Mm-hm.

19 Q -- gender minority students. So could you talk a little  
20 bit about that and what the newer research is telling us about  
21 trans and gender nonconforming students in particular?

22 A Sure. So that is accurate. Much of the research prior to  
23 2010 did focus on sexual minorities. And by "sexual  
24 minorities" I mean individuals identified as gay, lesbian,  
25 bisexual, same-sex attracted but most likely still identify as

1 cisgender. The bulk of the research prior to 2010, though with  
2 exceptions, focused on those students, which is where the  
3 evidence -- where many of those disparities were.

4 After 2010, I think -- you know, I don't -- society on the  
5 whole has become much more aware of transgender people. You've  
6 seen that reflect in the research that psychologists and other  
7 academics have done where there's been a wide explosion in  
8 research on transgender people over the past decade, including  
9 in higher education.

10 And what some of our research has found is that  
11 transgender -- and TGNC is Transgender and Gender  
12 Nonconforming. So by "nonconforming," that may be people who  
13 are nonbinary, meaning they don't identify as male or female.  
14 And what the research has found is that they -- trans people  
15 not only experience some of those same health and educational  
16 disparities, but that they may experience them in a way that is  
17 worse or more severe.

18 And what researchers have hypothesized to explain that is  
19 that they have some different needs, including medical needs,  
20 that are very unique for trans students who may transition,  
21 including mental health needs of finding culturally competent  
22 counselors, psychologists, mental health professionals who know  
23 how to work with trans people and also that -- again, just  
24 society's lack of understanding of trans people has an effect  
25 on them as well.

1        So, for example, one of the participants in the  
2 qualitative study that we did said that, you know, "I feel like  
3 students on campus -- they all understand what it means to be  
4 gay or lesbian. But no one understands what it means to be  
5 transgender, or they have very inaccurate views of what this  
6 means."

7        Students also saying -- and this was specific to religious  
8 colleges -- participants in the study saying, "I can find  
9 materials on campus or in the library about sexual minorities,  
10 but I can't find anything on campus or in the counseling center  
11 or in the campus health center about trans people, trans  
12 identities," and feeling very stigmatized by that.

13        Q     And, Dr. Wolff, I'm wondering whether you can answer -- in  
14 light of the research you have done and also what you've  
15 reviewed -- would you expect that most of the campuses that,  
16 you know, we're talking about in this case -- that it's very  
17 likely that they do in fact have students who are trans or  
18 gender nonconforming on their campuses, whether that are  
19 closeted or not?

20        A     Yes. I don't see how -- I don't see how that could be  
21 possible that they would not have trans students. In fact --  
22 and while this isn't in my testimony -- early estimates of the  
23 prevalence of trans people in the U.S. used to be about one --  
24 less than one percent. And many researchers have questioned  
25 that, that trans people -- there's many, many more trans people

1 than what early estimates have indicated.

2 And so, again, while I don't have an exact statistic on  
3 that from religious colleges -- and of course that's a  
4 limitation -- I would find it nearly impossible to believe that  
5 there are not trans and nonbinary people on every college in  
6 this country -- not just at religious colleges -- including  
7 religious colleges.

8 Q And, in fact, some of the data -- the qualitative studies  
9 and other studies that you've done have -- with respect to  
10 non-affirming religious campuses -- that either you've done or  
11 you've reviewed -- did include data from trans students on  
12 those campuses; right?

13 A Yes, that's correct. That's correct.

14 Q Well, thank you for that. I would like to turn to  
15 another -- next page of your report. So this is -- let's  
16 see -- Wolff page 7. I'll scroll down a little bit. Now, this  
17 is under your heading of "Research on Relationships Between  
18 Religion and Health Among LGBTQ+ People."

19 A Mm-hm.

20 Q And I'm going to kind of zero in more on the final  
21 paragraph here. You referred to a Meyer study. We heard from  
22 Dr. Meyer yesterday about -- he said he "found that seeking  
23 treatment from a religious or spiritual advisor was associated  
24 with increased odds of attempting suicide, even when  
25 controlling for previous mental health diagnoses and multiple

1 suicide attempts." Dr. Meyer provided some further testimony  
2 on that yesterday.

3 And then you go on to say, "Further, individuals who  
4 experience dissonance between their religious beliefs and  
5 sexual orientation are often inclined to seek out sexual  
6 orientation change efforts, such as reparative or conversion  
7 therapies."

8 So I was wondering if you could talk a little bit more  
9 about that and about the impact on a non-affirming environment  
10 or non-affirming messages, particularly in the context of  
11 college students, and whether that has an impact on the  
12 likelihood that they will try to -- that they will try to seek  
13 out conversion therapy.

14 A Yes. So thank you for that question. What previous  
15 studies have shown is that the majority -- though not all --  
16 but the majority of individuals who seek out conversion types  
17 of therapies do come from non-affirming religious backgrounds.  
18 So we know that somehow that is linked to why people seek these  
19 therapies out.

20 And examples of why that might be would be feeling that  
21 perhaps it's a higher power's calling that they will be able to  
22 change. But there's also data to suggest that people feel  
23 pressured in those environments. That they may feel that the  
24 only way to be accepted by their church or their family is to  
25 change, and that many of the -- sort of the ex -- they call

1 them conversion therapy movements or ex-gay ministries -- those  
2 are often affiliated with non-affirming religious institutions  
3 or models.

4 And, therefore, again, there is this draw for people  
5 within those backgrounds that that -- to say, "Look, we can  
6 offer you something that can change you. You don't have to be  
7 gay. You don't have to be -- experience same-sex attraction or  
8 gender identity dissonance for people who are transgender" --  
9 that may be a very alluring offer to the individuals who are  
10 seeking out those kinds of treatments.

11 And I believe, Mr. Southwick, there was a second part to  
12 your question, and I'm blanking on...

13 Q Well, I think that you answered it. I was going to ask  
14 you a follow-up though, which is several of the plaintiffs in  
15 this case -- they describe various experiences with conversion  
16 therapy --

17 A Mm-hm.

18 Q -- while students, whether it was something that was  
19 suggested to them, mandated for them, or something that they  
20 kind of just sought out on their own. I was wondering -- and I  
21 believe your report talks about -- is there data on --  
22 particularly for students who are attending these non-affirming  
23 religious colleges and universities -- is there any data that  
24 shows that they are experiencing some kind of sexual  
25 orientation change efforts or at least some of the LGBT



1 population on these campuses is experiencing that?

2 A Yes, I believe there is. And I'd like to start by  
3 answering that question a bit generally and then talk about  
4 some specifics there in terms of what we can glean from the  
5 data.

6 First, I'll go to a 2010 report that my colleague and I  
7 published where we did a random review of different code of  
8 conducts, honor policies amongst non-affirming religious  
9 universities and colleges. And we found that one of the things  
10 mentioned in some of those behavioral policies was mandatory  
11 counseling -- a mandatory referral to see a mental health  
12 professional if someone finds out you might be gay or  
13 transgender.

14 And that doesn't mean it's conversion therapy. I'm not  
15 making that accusation. But I will say that it's concerning  
16 from a standpoint as a psychologist where our ethics code of  
17 the American Psychological Association is quite clear that it  
18 is problematic to pressure someone into mental health services  
19 or to mandate someone see a -- and especially in that kind of  
20 situation. So it raises ethical concerns that someone could be  
21 pushed into a mental health treatment situation against their  
22 wishes.

23 And, again, what happens in those sessions I don't --  
24 that's -- that report did not assess that. However, what we  
25 found in later research was, first, from a quantitative survey

1 that about 17 percent of the sexual minority students that we  
2 interviewed -- this was a sample of 213 students -- said that  
3 they had a mental health -- let me just find the exact wording  
4 from that question. I have it right in front of me here.

5 Q I believe this might be on page 15.

6 A Okay.

7 Q The statement on page 15.

8 A Okay.

9 Q I'm pulling some of this up here now on the screen.

10 A So the question was asking students to say "yes" or "no."  
11 And the question was "a mental health professional attempted to  
12 change their sexual orientation." 17 percent of our sample  
13 said "yes" to that. So a limitation of that is we don't know  
14 whether that was on campus or off campus. Yet, from looking at  
15 other studies, including the Craig 2017 study, students clearly  
16 describe this happening on campus, in the campus counseling  
17 center, at religious colleges and universities.

18 Further, in our study with transgender students we  
19 interviewed, while they did not necessarily speak to conversion  
20 therapy, they said, "I think I was misdiagnosed. I was told  
21 that I had a mental health problem that I didn't have rather  
22 than receiving the treatment I needed or the support I needed  
23 because I was experiencing gender dysphoria," which is a term  
24 in the DSM-5, the -- kind of a diagnostic book that mental  
25 health professionals use. So it raised concerns that this

1 likely is happening on campus, that students are reporting  
2 this, though we don't know the exact prevalence.

3 Q Dr. Wolff, yesterday several of the plaintiffs in this  
4 case provided testimony. And, in particular, Audrey at George  
5 Fox University testified about feeling like mental health  
6 services were inaccessible to her as a queer person and as a  
7 queer person who had survived a sexual assault. And other  
8 plaintiffs had testified about not feeling like they could  
9 trust the on-campus counseling center, or that they might get  
10 in trouble if they reveal their gender or sexual identity even  
11 to someone at the counseling center.

12 A Mm-hm.

13 Q Does the research and data that you've looked at support a  
14 finding that, you know, their experiences are not isolated and  
15 have been experienced by other students in similar  
16 circumstances?

17 A I believe it does. I believe we need more data to fully  
18 understand that. But I believe that the preliminary data,  
19 especially from these qualitative studies, says that students  
20 may feel it is inaccessible because they will not be understood  
21 or not receive culturally competent care.

22 So, for example, of that would be -- hypothetically, if a  
23 transgender student who was starting hormones went to their  
24 campus medical center wondering is the -- is the medical  
25 provider going to be knowledgeable about the endocrinological

1 research about hormones for transgender people?

2       Specific to mental health settings, can students in our  
3 transgender study talk about feeling like -- that they weren't  
4 understood as a result of their gender identity?

5 Q     And I'd like to specifically look at a section of your  
6 statement here, Dr. Wolff, on page 15 where you discuss that  
7 various factors -- stigma, potential disciplinary action, lack  
8 of competency as you've just described -- may also partially  
9 explain the lower than expected utilization rates of campus  
10 services amongst students who attend NARUs.

11       Could you talk a little bit about that specifically? And  
12 you do note that there is more research and data needed on this  
13 hypothesis. But can you tell us where you -- how you came to  
14 this conclusion the stigma, disciplinary action may explain the  
15 lower utilization rates and also just touch on what those rates  
16 are?

17 A     Sure. So the main evidence of coming to that conclusion  
18 is the reports directly from students who went to their campus  
19 counseling centers. And this came from the transgender study  
20 that we did as well as the Craig 2017 study. But also thinking  
21 more broadly that -- you know -- one of the factors that  
22 predicts whether or not psychotherapy is effective -- what we  
23 know from the research is it has -- it has less to do with the  
24 specific technique that the therapist used and more to do with  
25 the rapport and the relationship that the therapist and that

1 client or patient have.

2 And so if someone feels that they're not understood, not  
3 safe, or that someone is not knowledgeable to be able to help  
4 them -- and perhaps -- that is going to be a major deterrent  
5 for someone seeking help. And, again -- so we -- that  
6 conclusion is based on those variety of factors. As I said  
7 there, more research is needed to understand that.

8 And -- as well as what the -- I think you asked about  
9 prevalence data. I think that -- I don't think I can answer  
10 that question. I think that -- I don't think there is exact  
11 prevalence data to -- about how common that is.

12 Q And, Dr. Wolff, given that at many of these educational  
13 institutions with non-affirming policies -- many of them  
14 require all their faculty and staff -- including faculty and  
15 staff of the counseling center or psychology department --

16 A Mm-hm.

17 Q -- or residence life staff, student life staff, others who  
18 LGBTQ students might turn to for support from a professional or  
19 lay support -- would it be a concern to you or a potential risk  
20 factor if the university requires all of those kinds of  
21 supportive staff members to abide by non-affirming policies and  
22 non-affirming stances when dealing with LGBTQ students who come  
23 to them for help? Is that a concern to you or a risk factor to  
24 you in terms of queer and trans students being able to access  
25 services and support they need on campus?

1 A It would be a concern. I think I answered that question  
2 more from the perspective of students that we asked that  
3 question in our 2017 study and noting examples. That they had  
4 faculty members that they felt were supportive that did want to  
5 of course, you know, for lack of a better term, be allies to  
6 them, but that those faculty faced consequences, faced threats  
7 of job loss, and that that had a chilling effect on students of  
8 not really knowing who's got your back, who can you turn to if  
9 you need support.

10 And, again, I would argue that's a difference in some  
11 religious colleges than in many nonreligious colleges that --  
12 you know -- most students at nonreligious colleges are going to  
13 be able to find faculty members that are -- could support them  
14 without being worried about losing their jobs or being  
15 dismissed.

16 Q Thank you for walking us through that, Dr. Wolff. I do  
17 want to turn back a little bit to your report. I know I kind  
18 of jumped ahead there. So I'd like to go back to Wolff  
19 Statement page 7. And -- let's see here -- and this is the  
20 section which starts about "Research on Campus Policies and  
21 Campus Climate at Non-Affirming Religious Universities."

22 Now, I think that this is the part of your report where  
23 you really start going into a lot of the data and the studies  
24 that you have done. Before we walk through specific ones,  
25 maybe you can just kind of tell us a little bit about what does

1 it mean when you say "Research on Campus Policies and Campus  
2 Climate at Non-Affirming Religious Universities" just so we  
3 kind of have that understanding of what exactly we're going to  
4 be talking about.

5 A Mm-hm

6 Q If you can kind of tell us in lay terms.

7 A Sure. So looking at the policies themselves would be  
8 examples of -- not -- this is maybe informed by an  
9 institution's religious beliefs. However, the policies  
10 themselves are actual behavioral standards that are attached to  
11 enforcement mechanism. So that could be a code of conduct on  
12 sexual morality. It could be in something in the employment  
13 contract about someone's beliefs on same-sex marriage. This is  
14 where there is something that is a policy that is enforceable  
15 as a disciplinary policy. It goes beyond just a religious  
16 belief.

17 Q All right. So, Dr. Wolff, this is an important  
18 distinction for our case. So I just want to make sure that  
19 everyone is on the same page. But when we're talking in this  
20 area, you're making a difference between just a mere  
21 theological statement or, you know, a statement about a belief  
22 about the Bible. The data and the analysis we're going to do  
23 is not about those kinds of things -- theological statements or  
24 theological provisions -- but it's really about campus  
25 policies -- policies where students can be, you know, getting

1 in trouble or be subjected to disparate treatment. And so  
2 that's the focus of the research that we're about to go into;  
3 is that fair to say?

4 A Well, we've studied both of those. But there are some  
5 specific findings to whether you're talking about non-affirming  
6 more broadly versus those with specific policies.

7 Q All right. And so maybe you can kind of start walking us  
8 through some of this. So you talked about how several of the  
9 non-affirming universities -- they have the codes of conduct.  
10 And you referenced some data from Dr. Coley who has also  
11 submitted an expert report in this case -- not as a testifying  
12 witness -- but could you just kind of briefly summarize what  
13 you have read of Dr. Coley's research on this subject?

14 A Sure. So I've read Dr. Coley's study that I've cited here  
15 that talks broadly about the policies themselves, which is  
16 actually a conclusion that you'll see referenced in my work as  
17 well, specifically about the wide range of these policies as  
18 well as some are very specific. Some really define exactly  
19 what is allowed or not allowed. Others are very vague. Others  
20 mention LGB students but don't mention trans students at all.  
21 And so there is quite a bit of a range of what these policies  
22 say and what they look like. And that was the part of  
23 Dr. Coley's work that I referenced.

24 Q And I do want to dig into that just a little bit. We read  
25 some policy language -- or some of the witnesses yesterday read



1 some policy language -- some of which was very specific such as  
2 prohibition on medically transitioning --

3 A Mm-hm.

4 Q -- of sex or gender. Very, very specific. Some forbid  
5 same-sex dating, which is also fairly specific. However, other  
6 policies said things, for example, like homosexual behavior  
7 is --

8 A Mm-hm.

9 Q -- prohibited. And so is that what you're getting at in  
10 terms of, you know, some of these schools have policies that  
11 are very explicit about what's allowed and what's not allowed,  
12 and others it's a little bit more vague, such as homosexual  
13 behavior? What does that mean? What does it not mean?

14 A Yes.

15 Q Is that what you're --

16 A Yes, it is. It is what I was getting at. And, you know,  
17 in fact, I'm pulling up quick the -- apologies while I look for  
18 this. So, for example, in the 2010 publication I referenced  
19 earlier of the 20 different behavioral samples we wrote that we  
20 reviewed, 10 of them used the word "homosexual behavior." 10  
21 of them use the word "homosexuality," which I would say is much  
22 broader than homosexual behavior. Others were nonspecific and  
23 others used phrases -- one used an amorous, same-sex  
24 relationship. So if you compare those three terms, you could  
25 have different meanings in each one of those.

1 Q Have -- in the data that you've looked at or any of the  
2 qualitative studies or interviews that you've done -- have any  
3 of the LGBTQ students expressed, you know, either confusion or  
4 distress about what they're allowed to do or not do and how  
5 that impacted them as a student? The vague policy, for  
6 example.

7 A Yes. Actually that quoted phrase there is one that a  
8 participant used saying, "I feel like it's don't ask, don't  
9 tell on campus. No one talks about this. I don't know where  
10 my campus stands. I don't know where they are at with this."  
11 Although many of those students said they felt it was very --  
12 it was clearer what the school's positions were on LGBTQ  
13 identities, but vague or nonexistent for what the policy was on  
14 trans and nonbinary identities.

15 Q So we're in the section that we've been just referring  
16 to -- the don't ask, don't tell -- there's a quote from a  
17 gender queer student there kind of talking about the feeling of  
18 isolation that comes from being a gender minority student. I'd  
19 like to ask a little bit about the next sentence there about  
20 how the participants in your 2017 study talked about, you know,  
21 this sadness or this remorse over lost opportunities to, you  
22 know, fully explore themselves.

23 You know, it's pretty much common knowledge that college  
24 is a time of exploration, and people are out of the home for  
25 the first time for many people, and that college is a time to

1 get to really know yourself. And so in contrast to that, can  
2 you tell us what some of these participants explained about the  
3 limitations or the difficulties of doing that at these  
4 institutions?

5 A Sure. So some of the participants in that study were  
6 current students and others were alumni. So that statement  
7 actually came from the alumni participants. And, again,  
8 looking -- this came often in hindsight for them looking back  
9 and saying, "This had a negative effect on me. I may not have  
10 fully realized it at the time, but this changed the way I  
11 engaged with campus. This changed how I was able to be myself,  
12 or talk about things that were happening to me, or explore  
13 aspects of my identity."

14 And as you noted, Mr. Southwick, college is widely  
15 understood as a time where people do explore various aspects of  
16 their identities.

17 Q And so, on one hand, it sounds like some of the alumni,  
18 you know, have these feelings of, "Wow, I wish I could have  
19 explored that part of myself." But then, on the other hand, it  
20 sounds like they did not regret concealing their identities.  
21 And can you explain a little bit why they didn't regret doing  
22 it?

23 A Sure. I would say that the elaborations that participants  
24 gave were twofold. One would be more antisocial aspects of it.  
25 Am I going to be rejected by peers, faculty, staff. The second

1 part of that came more from the institutional aspect. So if I  
2 come out, am I going to be able to find resources on campus  
3 such as a culturally competent counselor at the campus mental  
4 health center? Am I going to be dismissed administratively as  
5 a result of this policy? Again, a discrepancy there between  
6 students saying, "I wish I could have come out, but I'm glad I  
7 didn't. It wasn't safe."

8 Q The next paragraph of your report, Dr. Wolff, still on  
9 page 8, you talk about three previous studies examining  
10 possible consequences for LGBTQ students who violate policies.  
11 We had several witnesses, including Elizabeth Hunter and others  
12 yesterday, who talked about their experience with the  
13 consequences of violating one of these non-affirming policies.  
14 So can you talk to us a little bit about these three studies  
15 that you reference here and what the consequences can be for  
16 LGBTQ students who violate or who come in conflict with those  
17 policies?

18 A Yeah. So going to what I said earlier, I think it's  
19 important, again, to remind the Court that there is a wide  
20 variety here. To say that it's the same at all religious  
21 colleges, that probably isn't true. But, for some students,  
22 there are definitely consequences, which we looked at both in  
23 language of the behavioral statements of the codes of conduct  
24 as well as talking to students who have either experienced  
25 these consequences or said things like what I mentioned

1 earlier. "I'm not going to come out because I'm afraid of the  
2 consequences."

3 And so those consequences included academic probation or  
4 some sort of suspension that may not be permanent; I mentioned  
5 earlier mandatory referrals to the campus counseling center,  
6 which may or may not include the goal of changing sexual  
7 orientation or gender identity; restrictions on campus -- so we  
8 heard from students who said that they couldn't go in certain  
9 dorms as a result of being disciplined -- and, in an extreme  
10 case, expulsion.

11 And so the consequences of that, beyond what's just on the  
12 surface, include psychological harm. You know, being isolated  
13 further with someone who already feels like they don't fit in  
14 or is at risk for ostracism can potentially be harmful as well  
15 as with dismissal.

16 Beyond just no longer being part of the institution, there  
17 could be a real financial cost to students there, especially in  
18 graduate programs. You can't just transfer all your credits  
19 necessarily and go to a new school. That's not easy. And even  
20 in undergraduate, it's not necessarily going to all transfer.  
21 So you're taking up new sets of loans. You're reapplying to  
22 different colleges or universities. That obviously is  
23 stressful. And I think it's reasonable that this is going to  
24 have a financial impact on some students.

25 Q And, Dr. Wolff, turning to the next page of your

1 statement -- page 9 -- you provide a quote from who you refer  
2 to as a male identified participant in this study. And I'll  
3 just read it. And it states, "I was slated in the end to be  
4 put on a 40-day fast of bread and water because I loved another  
5 man. I am diabetic. If I had submitted to the fast, I would  
6 have died. I left the non-affirming religious university  
7 instead." This is obviously what I at least would call a  
8 pretty extreme example.

9 A Mm-hm.

10 Q But this is something that you heard in the course of your  
11 research from one of the participants?

12 A So this actually came from Shelley Craig's 2017 study,  
13 which was a qualitative interview study of LGBTQ students who  
14 attended these NARU institutions.

15 Q All right.

16 A And --

17 Q So not --

18 A Oh, go ahead.

19 Q So not your personal research, but research you are  
20 familiar with and literature you are familiar with in the field  
21 which you study?

22 A Exactly, yep.

23 Q Dr. Wolff -- oh, the -- sorry. I was struggling to  
24 remember what I was going to ask you, and it's come to my mind.  
25 The Council for Christian Colleges & Universities, which is an

1 intervenor defendant in this case --

2  
3 (Email alert sound from a computer.)

4  
5 MR. SOUTHWICK: Hm, let's see. I believe that is not  
6 my sound, but just in case it is...

7 THE WITNESS: It's not mine.

8 MR. SOUTHWICK: All right. Thanks. All right.  
9 Okay. I think we're clear.

10 BY MR. SOUTHWICK:

11 Q So I'll refer to them as the Council or CCCU. They are  
12 going to put on testimony later today through their own expert  
13 that will be discussing a report that was commissioned by the  
14 Religious Exemption Accountability Project. And that's a  
15 report about the prevalence of LGBTQ students at non-affirming  
16 religious colleges and also about mental health outcomes and  
17 that sort of a thing. And their expert has, you know, spent  
18 some significant time in his own report kind of attacking that  
19 report.

20 I just want to make clear for the record and for the Court  
21 that all of the data and analysis that you are discussing here  
22 today actually has nothing to do with that REAP report and, in  
23 fact, predates that report, which was March of 2021. And so  
24 all the data that you're discussing and the experience is  
25 completely independent of that report; is that correct?

1 A That is accurate. And I had no involvement whatsoever  
2 with the REAP report.

3 Q Excellent. Thank you, Dr. Wolff. All right. So I would  
4 like to continue on in your statement -- page 9 -- and -- let's  
5 see here -- I'd like to ask a little bit -- we've also heard  
6 from some of the plaintiff witnesses yesterday -- particularly  
7 Veronica at Baylor talked about being harassed or threatened as  
8 a student either by -- particularly by other students -- also  
9 at times by staff or faculty in different environments -- and  
10 the frustration with reporting that and nothing being done or  
11 the fear of reporting that.

12 I just note that, in your report, you state something,  
13 which I'm going to just kind of highlight here. You say, "In  
14 one study at a Catholic institution, it found that sexual and  
15 gender minority students who were harassed or threatened were  
16 less likely to report being victimized to their university,  
17 whether to a resident staff or the Title IX office, because  
18 they feared retaliation or worsening of the situation due to  
19 the non-affirming campus environment."

20 Could you just tell us a little bit about that or -- you  
21 know, it's I believe the Lockhart study -- if you could just  
22 tell us what that is exactly?

23 A Sure. So, again, that did not come from my own work. But  
24 what that study looked at was victimization, harassment,  
25 bullying on campus. And a significant number of students --



1 and I don't have the exact number of in front of me -- I'd be  
2 happy to get that to the Court though if that would be  
3 helpful -- but students in that study saying, "I didn't report  
4 this. It's just going to make it worse. What if someone looks  
5 down on me because, in making that report, I tell them that I'm  
6 gay, and they don't support that -- or look -- you know --  
7 think that that -- I deserved it?"

8 Now, again, I'm being tentative with why that could have  
9 happened. But what students did say is "that feeling that it's  
10 just going to make it worse" or "something bad will happen to  
11 me," though more descriptive data would be helpful to know  
12 exactly why.

13 Q And then it looks like, even in one of your own studies,  
14 there was a similar conclusion drawn from your 2017 studies --

15 A Mm-hm.

16 Q -- as I've highlighted here on the screen; is that right?

17 A Yes. Yes, this did come from my study. I should say  
18 "our," because there were three other coauthors of that study.  
19 I don't want to minimize their contributions and the hard work  
20 that they put into the study as well. But this came from  
21 qualitative narrative accounts of trans and nonbinary students  
22 saying that, "I didn't feel protected," or felt like faculty  
23 that tried to be supportive were threatened or received letters  
24 saying that their employment contract was going to be  
25 rereviewed as a result of their support for trans students, as

1 well as one student who came out as trans and felt like they  
2 were harassed in classes after that by faculty members.

3 And so I don't have prevalence data on how often this  
4 happens. So, of course, that's a limitation. But as you've --  
5 you've asked repeatedly how may this be different from a  
6 religious non-affirming university versus other universities.  
7 As a faculty member myself at a private nonreligious  
8 university, I would be fired immediately for making comments  
9 like that.

10 And so to hear students say that this is tolerated is  
11 concerning, in my opinion. Though, we can't say that's true of  
12 all religious colleges, but certainly several students are  
13 saying it happened to them.

14 Q Thank you, Dr. Wolff. I'll go ahead and turn to page 11  
15 of your statement. And this is where you will talk about  
16 the -- I believe it is the 2016 -- is this the 2016 study --  
17 yes -- the 2016 study here --

18 A Mm-hm.

19 Q And you note just initially that the mental health and  
20 campus climate for LGBT students had not been specifically  
21 studied at non-affirming religious colleges in the scientific  
22 literature prior to 2016; is that correct?

23 A Mm-hm. That's correct. What did exist was an important  
24 study by Mark Yarhouse -- Dr. Mark Yarhouse -- on religious  
25 identity milestones. They also ask some questions about campus

1 experiences, but it did not assess mental health.

2 Q And so you and your colleagues did a -- you know -- the  
3 initial study on this with 213 sexual minority students. And  
4 can you talk to the Court about some of the conclusions of that  
5 study as you list here on pages 11 and 12?

6 A Sure. So the first one there -- moderately elevated  
7 clinical symptoms of depression -- and moderately elevated --  
8 that is actually the term used by the test publisher of that  
9 scale. The scale is called the CCAPS, which is the College  
10 Counseling Assessment of Psychological Symptoms (sic).

11 And what the CCAPS did is something called a criterion  
12 validity study. That's a statistical term for saying these are  
13 different thresholds where, if an average score is in this  
14 range or exceeds this number or is below this number, we can  
15 predict a greater likelihood of some distress. And the way  
16 that they classified that was moderate distress, high distress,  
17 or low distress for that.

18 And so in taking the average of those three -- of those  
19 scales there -- the ones mentioned above -- depressive  
20 symptoms, anxiety, eating concerns -- eating concerns are  
21 things like binge eating. That's a psychiatric term for when  
22 someone consumes an excessive amount of food in a short amount  
23 of time. It can also be caloric restriction like, for example,  
24 with someone having anorexia. That would be restricting  
25 intake -- in caloric intake -- although that doesn't mean

1 someone has anorexia just because that's where it was higher.  
2 Substance use, academic distress -- academic distress was  
3 defined on that scale as "worry about grades and academic  
4 performance," and then family distress. This is defined in  
5 that scale as "tension, lack of support within their family --  
6 immediate or extended family members."

7 And so average there was in the moderate range. And  
8 moderate means it may not meet the criteria for having a  
9 diagnosis according to the DSM. But there's a significant --  
10 there's stress going on for those students. There is a risk  
11 for those students. Though, we also have to keep in mind that  
12 with an average, mathematically, that's just -- there's a  
13 range. So that means that some -- well -- the average score is  
14 moderate. That means some students are doing better, and some  
15 students are doing worse than that.

16 Do you want me to move on to my second point there? Oh,  
17 I'm sorry, Paul. I can't hear you.

18 Q Thank you. Thank you, Dr. Wolff. That was a helpful  
19 explanation. I was going to ask you to go into what  
20 "moderately elevated" means for all of us lay folks. So thank  
21 you for doing that.

22 A Yes. Just to repeat, that's not my term. That is the  
23 classification term from the CCAPS manual.

24 Q Great. I want to ask you also about that second  
25 conclusion here about sexual minority students at

1 nondenominational, evangelical, and LDS institutions as opposed  
2 to Catholic and mainline Protestant schools. And you said that  
3 there was -- the data showed significantly more difficult  
4 sexual identity process suggesting that there may be added  
5 difficulties for LGBTQ students who attend non-affirming  
6 religious universities as opposed to affirming religious  
7 universities. Could you tell us what you mean about "difficult  
8 sexual identity processes"? What does that mean?

9 A Yes. That is a -- that is a subscale from an inventory  
10 called the Lesbian, Gay, Bisexual Identity Scale. And what  
11 that asks about is questions, for example, of figuring out my  
12 sexual identity has been a very painful process for me.  
13 Figuring out my sexual identity has been a difficult process  
14 for me.

15 So it's not just asking questions about what may be  
16 difficult because of religious beliefs or conflict with  
17 someone's religious beliefs. It's asking about some of the  
18 emotional impact of that by using words like "painful" on the  
19 actual scale that was used to develop -- to calculate those  
20 averages.

21 Q And I do want to note -- I believe you referenced this --  
22 but later on in your report you state that, you know, it's  
23 important to note that psychological distress can still be  
24 damaging in the absence of a formal psychiatric diagnosis.

25 A Mm-hm.

1 Q And so would you say that that would be true? And how is  
2 that true in the context of what you've just been describing  
3 about the difficulty with sexual identity process?

4 A Sure. Just broadly speaking, again, you don't necessarily  
5 have to have a psychiatric diagnosis to know that higher  
6 anxiety can lead to higher blood pressure, it can lead to sleep  
7 problems, whereas depressive symptoms, even in a more moderate,  
8 non-diagnosable form, can also lead to problems sleeping,  
9 changes in weight, appetite, things like that.

10 So I remind the Court that not having a diagnosis doesn't  
11 mean someone's just assumed to be doing great. And, you know,  
12 in fact, I think almost every psychiatrist and psychologist  
13 would agree with me on that. We have a whole section of the  
14 DSM, that diagnostic book, called Z codes where we have a way  
15 of listing environmental or situational stressors that may  
16 warrant intervention or treatment even if someone doesn't meet  
17 criteria for a full mental health diagnosis based on DSM  
18 criteria.

19 Q Thank you, Dr. Wolff. I'm now going to turn to the 2017  
20 study, which you describe as a continuation of the 2016 study,  
21 relating to doctoral student Dr. Cunningham. And can you talk  
22 to us about that study? And I believe that the conclusions are  
23 referred to on page 14 of the Wolff Statement.

24 A Yes.

25 Q And if you can talk to us specifically about those

1 conclusions.

2 A Sure. So what we did was we took what's considered the  
3 standardization sample of the CCAPS. This was a study  
4 published by McAleavey in 2011 from data that they had  
5 collected in 2009-2010. And then we compared it to -- and this  
6 was college students broadly across the country from all types  
7 of colleges and universities -- where they gave them the CCAPS  
8 and they also then broke down averages and standard deviations  
9 by sexual identity labels or demographic terms, meaning someone  
10 said, "I identify as gay," versus lesbian, versus bisexual,  
11 queer, or other.

12 We then -- we also asked those same questions in our study  
13 relatively around the same time. And though -- so while they  
14 are different studies -- and that's an important limitation to  
15 acknowledge -- we did ask very similar questions in terms of  
16 sexual identities. And we used the exact same scale to assess  
17 these mental health symptoms, which is the CCAPS.

18 And what we found is if we took the averages from -- this  
19 is general college and university population -- this is all  
20 sexual minority college students is what that's essentially  
21 getting at -- and, of course, you know, in statistical  
22 research, rarely do we ever get to sample every single person  
23 in the population -- but -- so what we do is we sample, and  
24 then we make estimates based on what that sample says of a  
25 population.

1           This was -- we then compared those means and standard  
2     deviations to the means and standard deviations from our study  
3     that only looked the at LGBT or sexual minority students in  
4     non-affirming religious higher education.

5     Q     All right. I'd like --

6     A     So physically -- yep.

7     Q     Oh, if I could just jump in just to make sure that -- I  
8     just want to kind of say it in a little bit more general of  
9     terms.

10    A     Sorry.

11    Q     But basically --

12    A     Less talking -- I apologize for that.

13    Q     Yeah. No. No, that was very helpful. But, in general,  
14    the conclusions that you're going to discuss now -- that's  
15    comparing the LGBTQ population and the general college  
16    population -- so religious and nonreligious colleges -- and  
17    then a comparison of that with LGBTQ students, particularly at  
18    non-affirming religious universities and colleges. Is that  
19    generally correct?

20    A     Yes. And it's an estimate only because they were not the  
21    same samples. So it's just an estimate but important to note  
22    that there are some statistically significant differences.

23    Q     Great. And could you describe what those are as they are  
24    listed here on page 14?

25    A     Sure. So sexual minority students at the non-affirming



1 religious universities in our sample reported significantly  
2 higher levels of depression than those identified as gay and  
3 bisexual in the general college student population. .2  
4 there -- there was a marginally significant level -- higher  
5 levels of depression amongst our students who were lesbians  
6 amongst the non-affirming religious universities than when  
7 compared to students in the general population.

8 And marginally significant -- I won't go into too much  
9 detail unless it would be helpful to the Court. It just  
10 means -- it's a statistical term that means right on the fence  
11 of statistical significance, meaning we shouldn't ignore it,  
12 but we can't interpret it as conclusively.

13 Q Great, thank you.

14 A The third finding there is that the students in our sample  
15 reported significantly higher levels of social anxiety than  
16 those who identified as "other" within the general college and  
17 university population. "Other" meaning that someone either  
18 wasn't -- wasn't quite sure or had an identity that wasn't  
19 specifically LGBTQ. So an example of that would be pansexual.  
20 That is identity where we did not specifically list that as a  
21 category and neither did the study by McAleavey. So if that  
22 was someone's identity, they'd have to pick "other" in the list  
23 of choices.

24 We also found that gay students in our sample had  
25 significantly higher disordered eating symptoms than gay

1 students in the general population. Again, what that could  
2 mean for disordered eating could be binge eating, purging,  
3 calorie restrictions, things like that clinically.

4 And then questioning students -- so those are the students  
5 saying, "Yeah, I'm not really sure what I am when it comes to  
6 my sex orientation." Also showed those marginally significant  
7 higher disordered eating symptoms than questioning students in  
8 the general college and university population.

9 Q Great. Thank you, Mr. Wolff, for explaining some of those  
10 terms for us -- that's very helpful -- and for explaining this  
11 follow-up 2017 study.

12 So we've gone through a lot of the studies that you and  
13 your colleagues have done -- through a lot of the literature  
14 and studies of others in your field -- and what I'd like to do  
15 now, as we're wrapping up the direct here of your examination,  
16 is to turn to the evidence-based strategies for reducing  
17 psychological distress and other risks for LGBTQ+ students.  
18 And that's on page 16 of your report.

19 And I'll just note that you and your colleagues have  
20 proposed a four-pronged strategy for reducing the stress.  
21 Those include, one, changes to internal anti-harassment and  
22 nondiscrimination campus policies. And so, just to clarify,  
23 those are the policies of the educational institutions  
24 themselves; is that right?

25 A Mm-hm, yes.

1 Q And then the development and expansion of campus  
2 resources --

3 A Yes.

4 Q -- oversight from accreditation agencies, and enforcement  
5 of civil rights protections and oversight of compliance from  
6 government agencies and other regulators.

7 And so I'm going to ask you some questions about some of  
8 these. In terms of changing campus policies -- we're still on  
9 the same page -- page 16 here -- you note halfway through this  
10 paragraph -- which I'll just highlight here -- you state,  
11 "Further, several studies show evidence that when university  
12 leaders and administrators change policies and create more  
13 inclusive environments for LGBTQ students, these students show  
14 improved academic outcomes and reduced thoughts of suicide."  
15 Can you tell us just a little bit more about that and what  
16 these studies are?

17 A Sure. Excuse me, I'm just getting over a sinus infection,  
18 and my voice may go in and out for a moment. And just as a  
19 point of clarification, my colleagues and I, as well as, you  
20 know, really everything I've written or published, is focused  
21 on policies. I am not saying that religious colleges need to  
22 change their beliefs. I'm not saying that religious colleges  
23 need to change their theological interpretations. What I'm  
24 saying is that changes can be made to policies and how those  
25 are enforced, even if a religious college doesn't change its

1 religious beliefs toward some of these issues.

2 So, for example, adding sexual orientation and gender  
3 identity to anti-bullying, anti-harassment policies -- you can  
4 still believe that it's theologically sinful for someone to be  
5 LGBTQ, but also say, "We're not going to tolerate them being  
6 bullied or harassed on campus just because they're LGBTQ." I  
7 don't see those things as mutually exclusive.

8 And, again, there are many -- and some schools I think  
9 have done this where they started to have forums on campus in  
10 terms of, "Let's talk about this. Let's have academic debate.  
11 Let's have conversations that says we know this is a difficult  
12 issue, but we're not going to reinforce the silence and stigma  
13 that so many LGBTQ students in these environments experience."

14 And so, again, those are, I think, practical things that  
15 religious colleges can do without having to change their  
16 religious beliefs.

17 Q And the data further shows that if those kinds of policies  
18 are created, that there are, you know, verifiable improvements  
19 in academic outcomes and in reduced thoughts of suicide.

20 A Absolutely. Absolutely, it's an important point. Money  
21 in this research has come from colleges -- not religious  
22 colleges -- but colleges specifically that have implemented  
23 what we might call safe school policies for LGBTQ students.

24 Q Thank you, Dr. Wolff. And now I'd like to turn to what's  
25 at the bottom of page 17, and the (indiscernible) page of your

1 report, page 18. And this part of your report really goes to  
2 the heart of the Plaintiffs' case. And I know you're not here  
3 as a legal expert, so I'm not asking you to make any legal  
4 conclusions. But you talk here about the enhanced oversight in  
5 civil rights protection.

6 A Mm-hm.

7 Q You state that, "We know, from a variety of studies, that  
8 policies which discriminate against LGBTQ people are associated  
9 with psychological harm and widening of health disparities." I  
10 think that you've discussed a number of those. Dr. Meyer has  
11 discussed a number of those as well.

12 And you give an example here about where state laws permit  
13 denial of service to same-sex couples. There are a lot of  
14 these religious refusal type laws that -- that there was an  
15 association with an increase of mental distress. Is that  
16 right? And could you talk to us a little bit broadly about the  
17 impact of state laws that -- or laws or policies -- that permit  
18 denials based on LGBTQ status?

19 A Sure. This is not my research again. This is from other  
20 published studies. But several studies do show a link between  
21 discriminatory policies toward LGBTQ people and increased  
22 mental distress. And much of that research has been focused  
23 around some of the same-sex marriage debate and the  
24 theorization there, again, that individuals who -- in states  
25 that denied same-sex marriage rights compared to states that

1 granted same-sex marriage rights -- that LGBTQ people were  
2 doing better. They had better mental health. They had  
3 improved mental health outcomes in states that had  
4 nondiscriminatory laws that allowed for full legal recognition  
5 of same-sex marriages.

6 And, again, the theory behind that is not only can someone  
7 then be granted legal protections that are offered through  
8 marriage, but there's also a psychological component to that  
9 knowing you have access to that. Even if you never get  
10 married, there are still mental health benefits to knowing that  
11 the law treats you as an equal.

12 The reverse of that is also true. Even if someone never  
13 plans to get married, knowing -- and, again, this was  
14 pre-Supreme Court ruling when this research was done -- but  
15 what they found was, again, even if someone didn't plan to get  
16 married, just knowing that your state didn't see you as an  
17 equal, that your state was not going to grant you a marriage  
18 license, that that was psychologically harmful, even if that  
19 person never showed up to the county clerk's office to request  
20 a marriage license.

21 Q And more specifically in the context of Title IX  
22 enforcement and enforcement of civil rights protections for  
23 LGBTQ+ students, you note here that -- as you've just been  
24 describing -- the impact of policies and laws -- you note that,  
25 "It is one of the reasons why medical, scientific, professional

1 associations such as the American Psychological Association and  
2 the American Medical Association have vigorously advocated for  
3 expanded civil rights laws that protect LGBTQ people and can be  
4 enforced. And that that specific -- that advocacy has  
5 specifically included enforcement of Title IX with respect to  
6 LGBTQ+ students." Is that right? And could you speak to that  
7 a little bit more?

8 A Yes. I was referring to that statement above more broadly  
9 to LGBTQ civil rights issues where as the quote was Title IX  
10 specific. But in the advocacy aspect, that I was saying more  
11 broadly. And to give you examples of that -- decriminalizing  
12 homosexuality, funding for HIV aids research, same-sex marriage  
13 rights, recognizing same-sex couples rights to adopt  
14 children -- this has been -- and something I'm proud of as a  
15 member of the APA -- psychologists, psychiatrists, physicians,  
16 and other professionals as well have been at the forefront of  
17 advocating for equal rights protections based on decades of  
18 research that we have, based on decades of research saying that  
19 when you discriminate against people, it's harmful.

20 And so, again, I think to -- you know, me -- me advocating  
21 for this is not at all out of the norm for what many  
22 psychologists do. You know, when many of the, you know, court  
23 rulings on same-sex marriage or other issues cite briefs from  
24 the American Psychological Association, my profession has  
25 vigorously advocated for equal rights protections based on a

1 large body of our research.

2 Q And, Dr. Wolff, specifically with this highlighted  
3 language on page 18, you note that the APA came out with a  
4 statement about this. And just to provide a little context for  
5 the Court, during the Obama Administration, there was a  
6 determination by the Department of Education, including the  
7 Office of Civil Rights, that they were going to start  
8 investigating complaints from transgender students for sex  
9 discrimination under Title IX and -- relating to restroom use  
10 and other things like that. And then that policy decision was  
11 reversed under the Trump Administration.

12 A Mm-hm.

13 Q And so I believe that this APA comment was coming within  
14 that context and stating that the Department of Education's  
15 decision to stop investigating complaints from transgender  
16 students who are barred from using restrooms consistent with  
17 their gender identity will likely lead to negative mental  
18 health outcomes for transgender students. Would you agree with  
19 that assessment?

20 A Yes, I would. And, as you noted, that is not my quote.  
21 That is directly from the American Psychological Association.  
22 But based on the evidence I presented, I would also agree with  
23 that quote.

24 Q And would you agree that, similarly, if the Department of  
25 Education refuses or declines to investigate complaints from



1 LGBTQ students at non-affirming religious colleges, that that  
2 would also be likely to lead to negative mental health outcomes  
3 for those students?

4 A I think that is a possibility. And I think of situations,  
5 for example, of a student being referred for conversion  
6 therapy. A student who is bullied on campus reports it to  
7 administration -- doesn't get any help. I think of those  
8 situations as someone has to step in. Someone has to stop that  
9 person from being harmed, which I believe was not part of  
10 Congress' intent of why it published -- why it -- why Title IX  
11 exists in the first place.

12 And so, yes, I do believe there are situations where it  
13 could be harmful to not have someone intervene. And I say that  
14 equally with nonreligious schools too. If someone is being  
15 harmed, and the university has not adequately stepped in, there  
16 has to be an oversight process.

17 Q And is that, in fact, why -- your understanding of why  
18 numerous divisions of the American Psychological Association  
19 have encouraged the Department of Education to investigate  
20 allegations of harm towards LGBTQ students regardless of  
21 whether the university is religiously affiliated or not --

22 A Yes.

23 Q -- or whether it has access to religious exemption or not?

24 A Exactly. We were not intending to just single out  
25 religious colleges and universities but to say these rules need

1 to be applied across the board. Because these situations can  
2 be harmful regardless of what college or university you attend.

3 Q Thank you very much, Dr. Wolff. And thank you for -- I  
4 know it's been a little bit of time, and your voice is going a  
5 little bit, but it stayed in there. I don't have any further  
6 direct questions at this time; however, counsel for the  
7 Defendants may have some questions for you. And I might have a  
8 little follow-up, depending on how that goes.

9 THE COURT: And, Dr. Wolff, I appreciate your  
10 patience with our technology, but it's much better than having  
11 to catch a flight in and out of Eugene.

12 THE WITNESS: That's true. Might I ask the Judge if  
13 I can just grab a glass of water quickly?

14 THE COURT: I think that's a great idea.

15 THE WITNESS: Okay. Thank you. I will try to be as  
16 quick as I can.

17 THE COURT: No worries.

18 THE WITNESS: My voice is going in and out.

19  
20 (A break was taken from 11:10 AM to 11:11 AM.)  
21

22 THE WITNESS: Thank you very much. I'm back.

23 THE COURT: You're welcome. And just as a heads-up,  
24 I think we'll probably take a break after we finish with  
25 Dr. Wolff for all purposes.

1 Ms. Snyder, are you doing the cross?

2 MS. SNYDER: I am, Your Honor. But we don't -- the  
3 Government doesn't have any questions. Thank you.

4 THE COURT: Well, thank you. For the Intervenor?

5 MR. MILLER: Yes, Your Honor. This is Nicholas  
6 Miller for CCCU, and we do have some questions.

7 THE COURT: Okay. Go ahead.

8

9 CROSS-EXAMINATION

10 BY MR. MILLER:

11 Q Dr. Wolff, thank you for being with us today --

12 A Thank you.

13 Q -- and for bringing your expertise to this proceeding.  
14 You do indeed have a distinguished background. You took a  
15 tenure track position at Adler University in 2014; is that  
16 right?

17 A No. It was not a tenure track position. It was a  
18 full-time assistant professor position.

19 Q I see.

20 A And then I, by my choosing, went to half time as an  
21 adjunct faculty about two years ago. So I've worked for Adler  
22 for over seven years now but just had different roles depending  
23 on whether I was full-time or part-time.

24 Q I see.

25 A And this research was all completed as a full-time

1 assistant professor.

2 Q So have you ever had a tenure track position somewhere?

3 A I have not. I worked at a tenure track institution,  
4 which, again, was at Rhode Island College, which I voluntarily  
5 chose to give up in order to complete my congressional  
6 fellowship in the Senate Health Committee.

7 Q Now, you've made it pretty clear that LGB students face  
8 unique challenges compared to their straight and cisgender  
9 peers at all colleges and universities, whether they're  
10 religious or not; isn't that true?

11 A I think that's an accurate statement.

12 Q And these negative experiences range from verbal and  
13 sexual harassment threats all the way up to physical assaults.

14 A Yes. Yes.

15 Q That, in fact, in the -- that you've noted in the past  
16 that some people find religion supportive and helpful to mental  
17 and emotional health; is that right?

18 A That's correct. And that's something I have tried to  
19 acknowledge in my own presentations and publications of --  
20 there also are positive effects. And not everyone has a  
21 negative experience, and some students have positive  
22 experiences.

23 Q And even as to LGB students -- LGB students --

24 A Yes.

25 Q -- can have a positive experience with religious

1 influences.

2 A I agree with you. Yes, that's accurate.

3 Q And do you know approximately how many LGB students in --  
4 you've -- there was testimony earlier that there's somewhere  
5 between 100,000 to 130,000 LGB students in CCCU schools or  
6 Christian schools generally. Is that figure about right?

7 A That I don't know.

8 MR. SOUTHWICK: Objection, outside the scope of  
9 Dr. Wolff's report and testimony.

10 THE COURT: All right. Please don't step on one  
11 another's statements.

12 MR. MILLER: Well, there was --

13 THE COURT: Wait, hold on. Stop. So the objection  
14 was made. I think the witness already answered he didn't know.  
15 I'm going to overrule the objection, and let's move on.

16 BY MR. MILLER:

17 Q And do you have a sense of what percentage of this  
18 population would actually be supportive of the policies at  
19 Christian colleges and universities?

20 A I'm not sure I understand your question. Are you asking  
21 what percent of the LGBTQ students there would be supportive of  
22 policies?

23 Q Yes. Yes, that's right.

24 A Okay. Certainly some would be. And that may be a reason  
25 why some students choose to go to those types of Christian

1 colleges and universities. Though -- and as I believe I've  
2 read -- as I read through the Plaintiffs' statements -- as  
3 students grow, as they have new experiences, some -- and  
4 explore aspects of their identities -- some will come to  
5 different conclusions while they are enrolled in Christian  
6 colleges.

7 Q But not all; correct?

8 A But not all.

9 Q And are you familiar with a Mark Yarhouse's study where he  
10 suggests that something like a third continue to support the  
11 sexual and gender outlooks of the Christian colleges?

12 A I've not read that study recently, but I have read it in  
13 the past.

14 Q And there's no reason you would have to argue or differ  
15 with him on that point?

16 A No, I don't think so.

17 Q So if there is a group of students that actually desire to  
18 be at the Christian colleges and universities, should they be  
19 prevented, in your view, by law from doing so?

20 MR. SOUTHWICK: Objection, calling for legal  
21 conclusion and outside the scope of Dr. Wolff's report.

22 THE COURT: Well, I'm going to sustain the objection.  
23 But the question's irrelevant. Let's move on and ask a  
24 question that would be helpful to the decision I have to make  
25 in this case, please.

1 BY MR. MILLER:

2 Q So let me talk a little bit about your 2016 study of  
3 Christian schools that you've given us testimony on. Now, the  
4 testimony wasn't a -- wasn't a random study; was it?

5 A No. It was a purposive, not a randomized, study, thus  
6 making conclusions to say "X percent of all Christian colleges  
7 have these experiences," is not something that that study can  
8 do.

9 Q And within this study, you didn't make comparisons with  
10 LGBT students at secular or public schools; did you?

11 A No. But that was what we did in the follow-up study for  
12 students' dissertation that is cited.

13 Q And so I'll come to that. That's the 2017 study; right?

14 A Yes.

15 Q So I'm focused on the 2016 study. And in the 2016  
16 study -- and we're -- actually, if we can pull up the expert  
17 report rather than the -- yes -- and I'm looking at pages 11  
18 and 12. You found in that study that there was greater  
19 difficulty that LGB students had in coming to terms with their  
20 sexual identity at nondenominational and evangelical schools as  
21 compared to Catholic and mainline Protestant schools; is that  
22 right?

23 A Yes.

24 Q And I believe the reason you give is that the Catholic and  
25 mainline Protestant schools had probably somewhat more liberal

1 behavioral guidelines.

2 A Yes. And that's a hypothesis, which is why we use the  
3 word "may." You know, that's -- but in theorizing why that  
4 might have been, certainly Catholic colleges can have the same  
5 theological beliefs as many evangelical ones but not attach  
6 those to disciplinary policies.

7 Q And also you talk about the fact that at these more  
8 liberal schools, that there's a greater preponderance of  
9 gay-straight alliances and student groups for LGBT students; is  
10 that right?

11 A Well, I don't think -- I don't think the phrase "more  
12 liberal schools" is my term. I think the distinction there was  
13 just whether or not they would have those policies that might  
14 have disciplinary policies for LGBTQ students versus those that  
15 would not.

16 Q So I think -- but you did in your paper -- 2016 paper --  
17 talk about the fact that there would be more gay-straight  
18 alliances at these Catholic and mainline Protestant schools; is  
19 that not right?

20 A It would make sense. And I don't have the prevalence data  
21 on that. But, again, if students are allowed to form  
22 gay-straight alliances -- and -- and that term is broad. I  
23 mean, not every college is going to call it a gay-straight  
24 alliance. I'm just using that term for a broad cluster of  
25 support groups. But it seems reasonable that many students who



1 are allowed to form support groups would want to.

2 Q And in your view, that would actually be a better practice  
3 on a Christian campus to allow this kind of support group and  
4 to support the students.

5 A It has the potential for decreasing some of those feelings  
6 of isolation, rejection, loneliness that I mentioned earlier.  
7 That is why I see potential benefits of that, as well as why,  
8 again, there's a wealth of previous research to say that  
9 students who are involved with those kinds of groups do tend to  
10 do better in educational settings.

11 Q So for perhaps the reasons that you've set out, and maybe  
12 for some other reasons we don't know about, that students at  
13 the Catholic schools and the mainline Protestant schools have  
14 less difficulty coming to terms with their sexual identity than  
15 some of the more conservative evangelical schools. And how  
16 would you -- how would you characterize more difficulty or less  
17 difficulty? I don't quite understand what --

18 A Sure.

19 Q -- you're --

20 A Sure. So that came from a scale -- a validated scale --  
21 that I believe was by John -- a psychologist named John Moore  
22 called the Lesbian, Gay, Bisexual Identity Scale, which I would  
23 be happy to share with the Court if that would be helpful. But  
24 some of those questions ask things like coming -- understanding  
25 my -- and I'm paraphrasing -- I don't have it right in front of

1 me -- but paraphrasing questions such as, "Understanding my  
2 sexual identity has been a very painful process for me."

3 And then the way that that scale is scored is a Likert  
4 scale where someone might say, you know, zero would be strongly  
5 agreed all the way up to, you know, five could be strongly  
6 disagree or vice versa.

7 Q So it -- would you say, as a counselor, that sometimes --

8 A Oh, I'm not a counselor. I'm a psychologist.

9 Q I see. I thought in your introduction that you provided  
10 counseling or psychological counseling to patients; is that not  
11 true?

12 A That's not true. I provide neuropsychological and  
13 psychological testing and evaluation.

14 Q I see. Okay. Thank you.

15 A Sure.

16 Q Would you agree that sometimes the easiest way forward  
17 isn't necessarily the best way forward?

18 A I'm not sure what you mean by that question.

19 Q Well, isn't it possible that students that wrestle more  
20 with their sexual identity and religious beliefs might actually  
21 accomplish more -- be in a better space at the end emotionally  
22 and personally -- than somebody who may have more easily put  
23 that together?

24 A Perhaps, especially if they have the right supports in  
25 place. And to back that statement up -- this is page 12 of my

1 statement -- Point No. 6 there says that "sexual minority  
2 students at non-affirming religious universities who belong to  
3 a GSA reported less negative identities about themselves and  
4 less difficulty understanding their sexual orientation."

5 So, again, that says that you -- that may be true for some  
6 students, especially if they have the appropriate support to go  
7 through that. But if they don't have the appropriate support,  
8 that could be more risky in terms of psychological harm.

9 Q But then if you actually continue on from where you were  
10 reading on your report, on page 12, you actually came to the  
11 rather remarkable finding that the study did not show a  
12 statistically significant difference in depression, social  
13 anxiety, and eating concern behaviors among the different type  
14 of NARUs?

15 A Mm-hm.

16 Q So that despite different levels of difficulty, some came  
17 to terms with their sexual identity more simply and others had  
18 greater difficulty. But still among those groups, you said you  
19 did not find different outcomes in terms of depression, social  
20 anxiety, and eating disorders; isn't that right?

21 A That's correct. Though, again, we did find those  
22 increases of other sorts of difficulties, which could certainly  
23 be linked to stressors. And, again, stress may not always mean  
24 that it correlates with a psychiatric symptom, specifically  
25 like depression or an eating disorder.

1 Q But your statement in your expert's report isn't quite  
2 true; is it?

3 A How so?

4 Q Well, because if you go back to the 2016 study that you  
5 based this report on, in that study you in fact do acknowledge  
6 that there was a difference in level of depression, social  
7 anxiety, and eating disorders between different kinds of NARUs.  
8 Do you remember writing this?

9 A Yes. That was specific to students that checked a box  
10 that was "other." They were asked what type of college do you  
11 attend, and then there was a wide variety of choices and then  
12 there was "other."

13 So the reason of not overinterpreting that is out of an  
14 abundance of caution, because that group was very diffusely  
15 defined. That "other" category was a wide range of possible  
16 schools. To try to draw conclusions from that and to  
17 generalize to that would -- it's just not something we could do  
18 statistically to really -- because that "other" category was so  
19 broadly defined.

20 Q Let's look at page 208 of your 2016 report. And if you  
21 can focus in on the paragraph beginning with, "With regard to  
22 mental health symptoms, our third hypothesis" -- and I'm  
23 reading from that paragraph -- "was partially supported for  
24 Mormons but not evangelicals. And the third hypothesis was  
25 that there would be greater emotional distress and depression

1 among the stricter religious schools. Students who attended  
2 other Christian schools" -- which is the category that you have  
3 the evangelicals in -- "reported significantly fewer symptoms  
4 of depression and social anxiety than students at Catholic,  
5 mainline Protestant, and Mormon NARUs." Is that what you  
6 reported?

7 A Yes. And as I mentioned earlier, and as we noted there,  
8 that's a very difficult finding to interpret because of the  
9 wide range of types of schools that were included in that  
10 "other" category.

11 Q And you include Mennonites and Quakers and Church of God.

12 A Well, that was what students wrote in. If they checked  
13 the "other" box, they then could write in what type of  
14 denomination -- what type of Christian college do you attend.  
15 Those are just a few of the many categories that students wrote  
16 in themselves.

17 Q But, in your understanding, this "other" category was the  
18 category that covered evangelical students generally. Because,  
19 in the following sentence, you say, "A possible explanation for  
20 why evangelical students did not report more depressive  
21 symptoms and social anxiety than those in other schools could  
22 be that students who find non-affirming theological positions  
23 and environments congruent with their religious beliefs would  
24 likely not be distressed by them."

25 A Sure. I stand by that statement. And, again, I want to

1 remind the Court that my conclusions are not that all students  
2 are doing bad or doing poorly. That there is a range. That  
3 some students might be doing quite well, some students are in  
4 the middle, and some really are struggling from a mental health  
5 standpoint.

6 Q But what I find very interesting is that your own report  
7 here suggests that the students that are doing best are the  
8 students that are actually in the more restrictive evangelical  
9 or nondenominational colleges, like Quaker, which George Fox  
10 was that we heard about yesterday, and the Church of God and  
11 the Mennonites. And that that subgroup that you report had  
12 significantly fewer symptoms of depression and social anxiety  
13 than the Catholic, mainline Protestant, and the more liberal  
14 colleges. Isn't that what's being said here?

15 A Well, those are only three examples of what fit into that  
16 "other" category. That was a wide range of different groups  
17 that did not necessarily fit clearly in one category or the  
18 other based on what -- how students saw their schools. So,  
19 again, to draw -- to draw interpretations from that would be  
20 very tenuous, which is why we approached that very cautiously.

21 Q And, yet, to -- again, you identified these as the  
22 evangelical students and conclude, did you not, that  
23 religious --

24  
25 (Indiscernible with multiple people talking.)

1 THE COURT: So stop, stop. Please, when people  
2 interrupt, just stop talking. There's obviously I think  
3 someone trying to make an objection, and people just keep  
4 talking over one another. Stop. Did I hear an objection?

5 MR. SOUTHWICK: This is Paul Southwick, Your Honor,  
6 making an objection. Misstates the expert's report and prior  
7 testimony.

8 THE COURT: Number 1, I'm going to go back and have  
9 the question finished and then have the witness answer. And  
10 I'm going to suggest that people stick to what is in the report  
11 also, and allow the witness to actually explain his answer and  
12 stop talking over the witness.

13 So reframe your question, take a breath, and let the  
14 witness answer the question. Because I think I know what --  
15 how he intended to answer. But I want to make sure it's on the  
16 record.

17 MR. MILLER: Okay.

18 THE COURT: Ask the question again.

19 BY MR. MILLER:

20 Q So this is -- this finding is why you've said that  
21 religion may offer a substantial amount of comfort and source  
22 of community to many SM individuals who find in congruence with  
23 their sexual orientation and their faith.

24 A Yes. And just as a point of clarification, I was not --  
25 we weren't including the Mennonite, Quaker, Church of God

1 students in the evangelical category. And that's because those  
2 students themselves did not consider it to be part of -- when  
3 they were asked to choose what type of school do you go to,  
4 they did not mark "evangelical."

5 But, yes, that last sentence there -- I still stand by  
6 that statement. And to reiterate again, there is a range of  
7 how students are doing. Some are doing well, and some are  
8 really struggling like some of the plaintiffs that we've heard  
9 from.

10 Q Now, I did want to ask you about the 2017 study, which  
11 you've said actually does look at a comparison of students on  
12 secular campuses with these religious outcomes; is that right?

13 A Yes.

14 Q And this was a student dissertation?

15 A Yes.

16 Q And it's not published in a peer-review journal; is that  
17 right?

18 A No.

19 Q And you noted that it covered two different groups -- two  
20 different study groups.

21 A Mm-hm.

22 Q -- from different schools, which would need to be the case  
23 if you're looking at public schools.

24 A Yes.

25 Q But it also covered quite different time periods too;



1 didn't it?

2 A Yes. This was collected -- let's see -- this would have  
3 been 2009 -- 2010 for the general -- versus 2012 into 2013 for  
4 our study. Though, while two years may sound like a long time,  
5 it wouldn't necessarily be out of the norm for comparison  
6 studies.

7 Q So are you familiar with the REAP study that's been  
8 discussed here to some degree?

9 A I have looked at it. I've not reviewed it for my expert  
10 testimony. I've reviewed it for -- I've reviewed the  
11 Plaintiffs' statements though.

12 Q But you know that the data was collected primarily during  
13 the pandemic; were you aware of that?

14 A Well, I can't speak to the methodology or sampling of that  
15 study, because I was not involved in it at all.

16 Q But if I told you that it was, would you agree that a  
17 sample taken during the pandemic period might be quite  
18 different from a sample taken say just a year or two earlier?

19 A It could be in a situation like that with the pandemic  
20 obviously being a major factor. It could. I can't necessarily  
21 say firmly one way or the other though.

22 Q So in your report you also talked about -- on pages 8 and  
23 9 -- about a -- a study that was carried out in -- also in  
24 2017.

25 A Mm-hm.

1 Q And I think --

2 A Well, that's when -- and that's when it was published --  
3 the publication date.

4 Q And this is a separate study from the dissertation; right?

5 A If I'm understanding your question correctly, are you  
6 referring, at the bottom of page 8, to the Craig, et al., 2017  
7 study?

8 Q Well, no. There's one your referred to at the top of the  
9 page.

10 A Okay. This is --

11 Q The qualitative interview study.

12 A I see. Thank you for clarifying.

13 Q The qualitative interview study that you were involved  
14 in -- that's not the same as the student dissertation; is it?

15 A No.

16 Q It's a different study. Yes. And so you talked about a  
17 number of incidents that this study talked about that students  
18 had shared anecdotes of coming out and feeling dismissed or  
19 disregarded.

20 A Mm-hm.

21 Q And that's one of the reasons many others felt that they  
22 were right in not revealing their identities; is that right?

23 A That is accurate of what some students shared with us  
24 about their experiences.

25 Q But you didn't have prevalence data on this, did you, as

1 far as what percentage had experienced it at these schools?

2 A Well, this was a qualitative study. And qualitative  
3 research is not designed for prevalence research. Qualitative  
4 research by nature is descriptive, whereas quantitative research  
5 talks about differences amongst averages, means, and prevalence  
6 type of statistics. So it would not have been appropriate for  
7 us to draw prevalence data from that study.

8 Q So would we know how many different schools this had  
9 happened at, at all?

10 A No, not from that -- not from that study.

11 Q So it could have been five or six students from one school  
12 that had a particularly bad series of practices and we wouldn't  
13 know?

14 A Well, there were seven different schools represented in  
15 that particular study. So, you know, I can't generalize beyond  
16 seven schools from that study. That said, if we look at other  
17 research, like the Craig 2017 study, that had a much wider  
18 range of study of different colleges and universities. But,  
19 again, with a qualitative study, it would be methodologically  
20 inaccurate to draw prevalence statistics.

21 Q So not only do we not know how many schools this happened  
22 at, do we know if any of those schools are involved in this  
23 particular lawsuit or named in the complaint in this particular  
24 lawsuit?

25 A I would have to go back and look at where the students

1 were from in order to answer that question.

2 Q But not to your knowledge now?

3 A They might be, but I'm not confident in that answer.

4 Q Well, you can't say? So you can't say if any of this  
5 anecdotal evidence had anything to do with any of the schools  
6 in this case?

7 A No. I can't -- I can't say that specific to these  
8 plaintiffs.

9 Q You also talked about a young man that allegedly had been  
10 told -- and I think this was on page 9 of your study -- that  
11 you were slated -- that he was punished by being slated to put  
12 on a 40-day fast of bread and water.

13 A Mm-hm.

14 Q Now, you made it clear that you didn't speak to that man  
15 yourself.

16 A Mm-hm. It was from somebody else's study.

17 Q Somebody else's study? Did you speak to the author of  
18 that study?

19 A No. That was a direct quote, though, from that published  
20 study.

21 Q And do you have any knowledge of what school that man was  
22 at?

23 A I would have to go back and look at that person's study,  
24 though that sample only included individuals from non-affirming  
25 types of Christian colleges.

1 Q But you can't tell us today if that man had anything to do  
2 with any of the schools presently involved in this lawsuit or  
3 named in the complaint?

4 A I can't say -- I can't say that. But I do remind the  
5 Court that, as social scientists, we don't look at just one  
6 statistic or just one quote and then jump to conclusions about  
7 that. What we're looking for are patterns. We're looking for  
8 overlap. We're looking for consistency. And that is where my  
9 testimony spoke to, is these concerns are not just coming from  
10 one study or one quote.

11 Though, that said, in that example, as Mr. Southwick noted  
12 earlier, that was an extreme example. It doesn't mean that  
13 that specific example is happening at every college or beyond  
14 that one.

15 Q So thank you for that. You've testified that you're  
16 concerned about reparative therapy or what some people call  
17 conversion therapy. Is that sometimes defined as broadly as  
18 any attempt to modify one's sexual orientation in one direction  
19 or another?

20 A Yes, though it wouldn't be, for example, talking to your  
21 pastor or your priest and, you know, prayer. It would be a  
22 more structured, intentional, guided approach to doing that,  
23 whether from a licensed mental health professional or a  
24 pastoral counselor. It would be beyond just a religious sort  
25 of theological approach to it. It would be using psychological

1 behavioral policies to try to -- or principles -- to try to  
2 modify someone's attractions or behaviors. Though who does it  
3 could vary, and, yes, there is some latitude of what that would  
4 look like. There definitely is some variability in terms of  
5 what that could mean.

6 Q But your study didn't actually determine if this was  
7 happening on any of the Christian campuses; correct?

8 A No. We did not ask if that was on campus. It was only  
9 asked while they were at school.

10 Q And the vast majority didn't experience it. I think you  
11 said something like 17 percent; is that right?

12 A Yes, 17 percent.

13 Q Now --

14 A Though I don't want to minimize those 17 percent. Just  
15 because it was only 17 percent doesn't mean that that  
16 17 percent might not have been harmed.

17 Q Fair enough. But let me ask you about the breakdown of  
18 the -- talking about the LGB community -- lesbian, gay,  
19 bisexual -- is it your understanding -- and Dr. Meyer testified  
20 yesterday from the Williams Institute.

21 A Mm-hm.

22 Q And are you aware that the Williams Institute says that  
23 about -- of the LGB community -- about 50 percent is B, or  
24 bisexual. Is that figure about right?

25 A Within the LGB community?

1 Q Correct.

2 A I've not looked at that exact statistic, but I think that  
3 that sounds conceivable.

4 Q So the Williams Institute says that the largest part of  
5 the LGB community is the B -- is the bisexual.

6 A It may be.

7 Q And being bisexual means that you can have romantic and  
8 sexual attraction to either gender; is that correct?

9 A That's correct.

10 Q So if somebody was bisexual and also had religious views,  
11 would it be something that they could choose to -- to not  
12 pursue same-sex relationships, but pursue those opposite-sex  
13 relationships that they were interested in?

14 A Conceivably, yes. Although, you don't -- that may still  
15 be very, very difficult on that person. So, for example, if --  
16 you know -- we don't -- we don't choose who we fall in love  
17 with. That student may very well say, "Well, I'm going to  
18 ignore this part of my bisexual identity towards people of the  
19 same gender, but then I've just fallen in love with someone of  
20 the same gender. I've been drawn into something unexpected."  
21 My point being, yes, but it may not be that simple.

22 Q Sorry. No, finish. I didn't mean to cut you off.

23 A Oh, I was done. I'm sorry.

24 Q But doesn't this happen to heterosexual people all the  
25 time in terms of once they make a commitment to a particular

1 romantic or sexual relationship, they have to choose to ignore  
2 other interests they might have?

3 A I'm sorry. What do you mean by "other interests"?

4 Q Well, if a man falls in love with a woman, and proposes to  
5 her and marries her, it doesn't stop him from having attraction  
6 to other women; does it?

7 A That's true. And people who are gay, lesbian, or bisexual  
8 can be in same-sex relationships but still choose not to be  
9 sexually active. So there is a range.

10 Q And would it be possible to have counseling to help you  
11 remain faithful to the relationship you choose to pursue rather  
12 than being moved or tempted towards other relationships?

13 MR. SOUTHWICK: Objection, vague and argumentive.

14 THE COURT: Sustained.

15 MR. SOUTHWICK: This is Paul Southwick.

16 THE COURT: Let's rephrase the question.

17 BY MR. MILLER:

18 Q Would it be an appropriate thing for a counselor to seek  
19 to help a client to be able to focus his affection and  
20 attention on his committed relationship rather than -- there's  
21 such a thing as sexual promiscuity and addiction and people --  
22 it damages people; right?

23 A Sure. I feel like we're talking about two different  
24 issues though. Someone's sexual orientation and sexual  
25 identity is not the same thing as whether they choose to have



1 an affair with someone that they're married to.

2 Q Or while they're married to someone.

3 A Yes. Yeah, sorry. That's what I meant. Yes.

4 Q No, correct. But they might want to -- what I'm trying to  
5 get at is that this bisexual community could seek counseling to  
6 avoid pursuing same-sex relationships, and you might call that  
7 reparative therapy of some kind, but it would still seem to be  
8 very appropriate given their romantic and sexual commitments  
9 and intentions.

10 A Well, that probably wouldn't be defined as reparative  
11 therapy. If someone was focusing on behavioral suppression,  
12 that's different from reparative therapy, which is actually  
13 trying to change someone's core sexual attraction or sexual  
14 identity.

15 Q So I --

16 A And in that situation, I think that -- yes -- I think that  
17 scenario you described is possible. But I don't -- I want to  
18 go back to earlier parts of my testimony that that -- that  
19 doesn't mean that that may not be very isolating, stressful,  
20 and difficult for that person.

21 Q Sure. And it would probably help if they were in the  
22 community and surrounded by teachers and counselors and  
23 friends --

24 A Mm-hm.

25 Q -- who shared their particular religious perspectives and

1 were going to help support them in that pathway; is that right?

2 A If they could talk about it without fear of retaliation,  
3 without fear of rejection. But, again, the participants that  
4 we've talked to in other studies have -- some have -- exactly  
5 what you've just described -- said that they could find that  
6 support, they could talk openly about it. And others have not  
7 felt that way.

8 Q So I wanted to -- you made a recommendation that it would  
9 be good for religious schools -- they wouldn't have to change  
10 their theology. They could add gender and sexual orientation  
11 to their anti-bullying and harassment restrictions.

12 A Mm-hm.

13 Q Are you not aware that many CCCU schools already have  
14 those policies in place?

15 A I am aware that some do, and I'm also aware that some do  
16 not.

17 Q You talked about the -- I think it was the Raifman article  
18 talking about the stress caused by policy discrimination.

19 A Mm-hm.

20 Q Do you remember that? I think that was on page 17 or 18  
21 of your article.

22 A Yes, that's page 18.

23 Q Page 18 of your article. Were you aware that there was a  
24 follow-up study done by Mark Anderson and several other authors  
25 called Marriage Equality Law and Youth Suicidal Behaviors, an

1 NBER Working Paper No. 26364, in October of 2019 --

2 A I'm not. No, I'm not aware of that study.

3 Q -- that shows the opposite to be true? That marriage laws  
4 were passed and that suicidal ideation actually heightened  
5 among youth during this period, and the hypothesis is due to  
6 the social backlash because of that. You're not familiar --

7 A I would --

8 MR. SOUTHWICK: Objection. I'd like to -- before you  
9 respond, if I may state an objection. This is Paul Southwick.  
10 I'd like to state an objection that the witness has already  
11 said he's unfamiliar with this study and we've not been shown  
12 this study. I would invite the counselor to make us all aware  
13 of this study. I don't have access to it either.

14 THE COURT: Sustained. And if that's the case, then  
15 somebody -- he doesn't know the study -- then you at least have  
16 an obligation to let him take a look at it.

17 THE WITNESS: I do not know that study.

18 BY MR. MILLER:

19 Q Okay. I will leave it there on that study then.

20 A Okay.

21 Q You've testified about the -- what you consider to be the  
22 adverse effects of the policies of the non-affirming colleges  
23 and universities. And I was wondering if you heard any of the  
24 testimony yesterday from the plaintiffs?

25 A Yes. I heard the last plaintiff and probably the second

1 half of the second-to-last plaintiff.

2 Q So there was certainly a fair amount of discussion  
3 questions and answers about -- at least many of these schools  
4 base their policies on sexuality and gender on their  
5 understanding of --

6 A Mm-hm.

7 Q -- the teaching. Would you agree to that?

8 A Yes.

9 Q And my question is, for you, do you think that their  
10 biblical understanding on sexuality and gender is wrong? Do  
11 they misunderstand the Bible, in your opinion?

12 MR. SOUTHWICK: Objection, calls for speculation.  
13 Also overgeneralizing all of the schools --

14 THE COURT: Sustained.

15 MR. SOUTHWICK: -- as if they have one single  
16 theology on this. I don't know how Dr. Wolff could answer.

17 THE COURT: Sustained.

18 MR. MILLER: I think it goes to bias as to whether he  
19 supports --

20 THE COURT: I think you need to rephrase your  
21 question. It is way too broad --

22 MR. MILLER: Okay.

23 THE COURT: -- and is taking many factors into  
24 account that I don't believe is an appropriate question given  
25 what's going to be helpful to this Court to make a decision.

1 Rephrase if you wish to ask the question.

2 MR. MILLER: Okay.

3 BY MR. MILLER:

4 Q Many religious colleges base their views of sexuality and  
5 gender on teachings in both the Old Testament and the New  
6 Testament about the sanctity of marriage and the necessity of  
7 it being between a man and a woman.

8 A Mm-hm.

9 Q Would you agree that you're familiar with colleges that  
10 believe that and base their policies on that?

11 A Yes.

12 Q And I'm wondering if you have personal views on that  
13 yourself. Do you agree with that as being what the Bible  
14 teaches, or do you disagree?

15 MR. SOUTHWICK: I object on relevance grounds.

16 MR. MILLER: I think it shows a question of bias and  
17 knowledge.

18 THE COURT: Overruled. Go ahead and answer it. I  
19 don't know that it shows either, but go ahead.

20 THE WITNESS: So are you asking me to speak to my  
21 personal religious views or my scientific understanding of  
22 those different religious views? I would appreciate clarity  
23 for your question.

24 BY MR. MILLER:

25 Q The first.

1 A Well, I was raised as an evangelical Christian. And so I  
2 will say I certainly have a good understanding of those  
3 religious views.

4 Q And do you disagree with them?

5 A It depends. On some, I probably do.

6 Q Dr. Wolff, I appreciate the time you've spent to talk with  
7 me today. And I thank you for it.

8 A Thank you for your questions.

9 THE COURT: Other Intervenors?

10 MR. SOUTHWICK: This is Paul Southwick. Do any other  
11 counsel have cross for Dr. Wolff?

12 THE COURT: Mr. Southwick, I just asked for that.  
13 The light went on for Mr. Lippelmann.

14 So, Mr. Lippelmann, do you have some questions?

15 MR. LIPPELMANN: I do. Thank you, Your Honor. I  
16 just didn't hear you at the beginning.

17 THE COURT: All right.

18  
19 CROSS-EXAMINATION

20 BY MR. LIPPELMANN:

21 Q Dr. Wolff, thank you for being with us. I only have a few  
22 questions for you. If you could help me understand the  
23 terminology a little bit better here, it might help some of my  
24 questions. So among the entire universe of religious schools,  
25 you designate only some of them as non-affirming religious

1 schools; correct?

2 A That's correct. Not all religious schools would be  
3 considered non-affirming.

4 Q Okay. Is there a term of art you use to describe those  
5 remainder of schools that you've not designated as  
6 non-affirming?

7 A Well, I think this is oversimplifying it. But you could  
8 say there are affirming religious colleges, there are  
9 non-affirming religious colleges, and probably somewhere in  
10 between. And of course that's a bit of an oversimplification.

11 Q Okay. Yep. That's helpful for me. Thank you. So in the  
12 course of your research, have you compared student outcomes for  
13 schools that you designate as non-confirming religious  
14 universities with student outcomes at universities that are not  
15 designated?

16 A No. That's an -- oh, I'm sorry to interrupt you.

17 Q I was finished.

18 A Okay. Yeah. No, that's an interesting question. That  
19 would be an interesting research study to compare affirming  
20 religious colleges with non-affirming. I don't know of any  
21 research that has done that direct comparison.

22 Q Okay. And I would just like to turn your attention to  
23 your report, which I will attempt to show you here. Okay. Can  
24 you see your report?

25 A Yes.

1 Q I've just shared that on my screen.

2 A Yes.

3 Q Okay. Now, I will represent this is page 1 of your  
4 report. And so I'd like to draw your attention to the second  
5 paragraph, or the final paragraph, on page 1, the first  
6 sentence. And that first sentence reads, "I have an extensive  
7 background in psychological research on the intersections of  
8 religion and lesbian, gay, bisexual, transgender, and queer  
9 spectrum LGBTQ+ people with the unique focus on LGBTQ+ student  
10 experiences at non-affirming religious colleges and  
11 universities -- NARUs -- particularly those with disallowing  
12 policies which prohibit the expression of LGBTQ+ identities."  
13 Did I read that correctly?

14 A Yes.

15 Q Okay. And then I note in the middle of that sentence the  
16 phrase "non-affirming religious colleges and universities."  
17 There's a footnote, and you define "non-affirming" as  
18 "theological beliefs that LGBTQ+ are sinful -- i.e., morally  
19 wrong -- and substandard to heterosexual and cisgender  
20 identities." Is that accurate?

21 A Yes.

22 Q That is the -- and you also cite there "Wolff and Himes,  
23 2010." Is that definition of non-affirming consistent with  
24 your understanding of the literature?

25 A It's not a perfect definition, but I think it's a



1 reasonable definition.

2 Q Okay. Thank you. So to determine whether a particular  
3 religious school is non-affirming, you look to that school's  
4 theological beliefs?

5 A Two ways we determine that -- the Wolff and Himes 2010  
6 citation is just what you just mentioned. It's going through  
7 the school's code of conduct, their theological statements,  
8 perhaps their honor code. It's gleaning the explicit  
9 expectations or theology around that. And the 2016 study is --  
10 we ask participants to make that determination. Did they  
11 consider their school to be non-affirming?

12 Q Okay.

13 A And that was an eligibility criteria to be a -- to  
14 participate in that study.

15 Q Sure. Thank you. I see in your report in the CV you  
16 attended Biola University for a master's degree; is that  
17 correct?

18 A And a doctorate -- my master's and doctorate.

19 Q Correct, okay. And while you were at Biola, you wrote a  
20 master's thesis on -- that was entitled "Evangelical Christians  
21 and Attitudes Towards Gays and Lesbians: Differentiating  
22 Between Sexual Orientation and Behavior." Is that the title?

23 A Mm-hm, yes.

24 Q In your experience, it is true that some schools draw a  
25 theological distinction between homosexual orientation and its

1 sinfulness and homosexual acts and their sinfulness?

2 A I think that's accurate that some schools make that  
3 distinction explicit.

4 Q Okay. Is that a type of theological distinction that you  
5 might consider in determining whether a school is  
6 non-affirming?

7 A Well, again, if you -- yes -- that could matter. But it  
8 was the participants determining that, in the later study at  
9 least, which would suggest -- though we didn't ask people this,  
10 so I say this cautiously -- but it suggests that some students  
11 would still consider that to be non-affirming even if it only  
12 said behavior.

13 Q Okay. During your direct examination, you discussed  
14 another distinction between a school's theological beliefs, on  
15 one hand, and their actions to express those beliefs and  
16 policies and practices.

17 A Mm-hm.

18 Q Is that right?

19 A Mm-hm, yes.

20 Q Okay. And --

21 A And, again, noting a -- I'm sorry to interrupt you --  
22 noting a wide range of how schools may express that.

23 Q Great. For those schools that you designate as  
24 non-affirming, is it your recommendation that those schools  
25 retain their theological beliefs but not enforce those beliefs

1 in policy and practice?

2 A No.

3 MR. SOUTHWICK: Objection.

4 THE WITNESS: My belief would be that schools can  
5 maintain those beliefs but create places that are safe for  
6 students; that they can create, you know, training on campus.  
7 So I think that that is actually an extension of beliefs and  
8 that they can treat students the same. For example, with you  
9 can't get married -- no sexual intercourse unless you're  
10 married -- you can hold all students to that standard and not  
11 say, "Well, you're going to be disciplined for holding hands  
12 with someone of the same gender, whereas this group is not."

13 BY MR. LIPPELMANN:

14 Q Okay. Those are all the questions I have for you. Thank  
15 you.

16 A Thank you.

17 THE COURT: Redirect?

18 MR. SOUTHWICK: Just to clarify -- this is Paul  
19 Southwick -- but DOJ doesn't have any cross on this witness?

20 THE COURT: They said on the record they have no  
21 cross. Didn't you, Ms. Snyder? Am I correct?

22 MS. SNYDER: That's correct, Your Honor. We do not  
23 have cross. Thank you. This is Hilarie Snyder.

24 MR. SOUTHWICK: All right. Thank you. Again, this  
25 is Paul Southwick. I just have a little bit of redirect. And

1 we'll have a brief section of examination about Dr. Wolff as a  
2 fact witness. That will be very brief.

3  
4 REDIRECT EXAMINATION

5 BY MR. SOUTHWICK:

6 Q Dr. Wolff, you were asked a little bit about behavioral  
7 supression versus orientation or attraction supression. And I  
8 want to ask you a little bit about this.

9 A Okay.

10 Q Would you agree that for a lot of LGBTQ+ people, that  
11 behavior -- such as holding hands, displaying signs of  
12 affection, or the manner of dress, pronouns, and  
13 presentations -- that those behaviors are an important part of  
14 their sexual or gender identity?

15 A Yes. And I can -- it doesn't have to include sexual  
16 intercourse. But those are just I think very -- things that  
17 make us human, things that -- how we express affection. That  
18 is a part of sexuality that doesn't have to include sex.

19 Q And is it also true that efforts to suppress those kind of  
20 behaviors -- holding hands, showing forms of intimacy that are  
21 not fully sexual but -- hugging and those kinds of things -- or  
22 using pronouns and dress -- that suppressing those kinds of  
23 aspects of identity through sexual orientation or gender change  
24 efforts -- that that can also be damaging to students?

25 A Yes. I would hypothesize just to -- yes -- especially

1 when there are different expectations for some students than  
2 others. So, for example, to say to transgender students,  
3 "These are the way you must dress," but then not to say that to  
4 cisgender students, that could have the effect of being very  
5 stigmatizing, of being very chilling in terms of feeling  
6 singled out due to policies being selectively applied.

7 Q And so just an example that I believe you alluded to --  
8 for example, if straight students are allowed to hold hands and  
9 not get punished, but queer students are not allowed to hold  
10 hands with someone of the same gender without being subjected  
11 to the risk of punishment, that would be a disparate type of  
12 treatment that could raise a stigma with those students; is  
13 that right?

14 A I would have that concern.

15 Q And then the last bit of redirect is you were asked about  
16 the definition of non-affirming religious universities and got  
17 into some of this belief versus policy distinction. And I just  
18 wanted to ask you a little bit about that. And it's my  
19 understanding that, in your research, what you concluded is  
20 that certain non-affirming religious universities can be  
21 non-affirming because of their theological beliefs about  
22 marriage or gender but can actually enact policies that are  
23 protective --

24 A Yes.

25 Q -- of LGBTQ+ students. So is that accurate?

1 A That is accurate.

2 Q (Indiscernible.)

3 A Good examples of -- sorry -- an example would be a  
4 university with a non-affirming belief system that says, "We're  
5 going to allow LGBTQ students to organize a social support  
6 group on campus because we know they need that."

7 Q Thank you, Dr. Wolff. I don't have any further redirect,  
8 so I'll go briefly into transitioning to your testimony as a  
9 fact witness.

10 All right. Dr. Wolff, I'd like to introduce, at the  
11 outset, two exhibits that have been circulated to the Court and  
12 Counsel. And I'd like to introduce the -- these are the Joshua  
13 Wolff September 29th, 2016, email. I'd like to introduce that  
14 as Exhibit 18. And then the Joshua Wolff June 30th, 2021,  
15 email as Exhibit No. 19 for Plaintiffs.

16 Any objections?

17 THE COURT: We have to wait a minute. I think people  
18 are searching for the exhibits.

19 MS. SNYDER: The Government Defendants do not object,  
20 Your Honor.

21 THE COURT: Government does not object.

22 Intervenors?

23 MR. LIPPELMANN: No (indiscernible) --

24 THE COURT: I'm not hearing you.

25 MR. LIPPELMANN: This is Mark Lippelmann for the

1 Religion School Intervenors. No objection.

2 THE COURT: Thank you.

3 MR. MILLER: And Nicholas Miller for CCCU. No  
4 objection.

5 THE COURT: Thank you. They'll both be received. Go  
6 ahead.

7 BY MR. SOUTHWICK:

8 Q Dr. Wolff, as part of your roles with the American  
9 Psychological Association, have you ever presented any of your  
10 research and data -- specifically some of the research and data  
11 that we've been talking about today and that is in your expert  
12 report -- have you ever presented any of this data to the  
13 Department of Education Office of Civil Rights?

14 A Yes, twice.

15 Q All right. And I'd like to direct your attention -- oh,  
16 I'll share my screen. I'd like to direct your attention to  
17 this first email. This is from you, Dr. Wolff, dated  
18 September 29th, 2016, to Mr. Joseph Wheeler and Seth Galanter  
19 from the Department of Education. And in this email it looks  
20 like you are extending your appreciation for making the time to  
21 meet with you and one of your colleagues. And so just to  
22 clarify, are Mr. Wheeler and Mr. Galanter -- they were with the  
23 Department of Education Office of Civil Rights; is that  
24 correct?

25 A That's correct, yes.

1 Q And so you're --

2 A And that meeting was set up -- Jenny Smulson, at that  
3 time, was a staff member in the Government Relations Office at  
4 the American Psychological Association. That's why you see her  
5 name.

6 Q Thank you. And you referred to having the meeting with  
7 them yesterday. So that would imply September 28th, 2016.

8 A Mm-hm.

9 Q Can you tell us what the purpose of this meeting was and,  
10 generally, the nature of the information or recommendations  
11 that you shared with the Office of Civil Rights at this time?

12 A Sure. The purpose of that meeting was to talk about the  
13 results of the 2016 study that I submitted as part of my  
14 testimony and to make recommendations based on that study but  
15 also based on APA's wider policies and position statements on  
16 safe school, safe climate, nondiscrimination ordinances and  
17 anti -- and efforts to oppose conversion therapy efforts. So  
18 that is what we spoke to OCR about representing both my  
19 research as well as Jenny speaking to APA's broader policies.

20 Q So would you -- is it fair to say that at this meeting you  
21 informed the Office of Civil Rights about the mental health  
22 disparities and concerns for LGBTQ students at non-affirming  
23 religious colleges and universities?

24 A That was explicitly discussed. Yes.

25 Q And did you make any recommendations about any protective



1 measures at this meeting?

2 A Yes, we did. We made four recommendations. The first is  
3 for OCR to clarify where Title IX exemptions may not apply.  
4 And so while that would be up to OCR -- I'm not a legal expert  
5 who could write that -- examples would be including saying,  
6 "You know, the religious exemption doesn't apply if you know of  
7 a student being harassed or bullied on campus and you don't  
8 intervene -- you don't do anything to stop that." We asked OCR  
9 to clarify that that would not necessarily be covered under  
10 Title IX exemption. We also asked OCR to --

11 Q Well, Dr. Wolff, I'm just going to stop you there --

12 A Yep.

13 Q -- with that recommendation. To your knowledge, has OCR  
14 made any clarification of that nature regarding harassment?

15 A The only thing I've seen -- and I -- again, I'm not  
16 speaking as an attorney or a -- but what I saw was a few months  
17 ago -- that OCR released a Title IX guidance statement. And at  
18 the very end of it, it says, "Can students at religious  
19 colleges still file Title IX complaints?" OCR's answer was  
20 "yes," though they did not say why, and they didn't -- to my  
21 memory -- and I'm paraphrasing here -- I don't remember seeing  
22 any explanation as to additional clarification of when they  
23 might pursue it or what situations they would take a more  
24 aggressive approach.

25 Q So essentially no clarification from the Office of Civil

1 Rights with respect to specifically whether a religious  
2 educational institution could assert a religious exemption to  
3 prevent an investigation of a harassment claim from an LGBTQ  
4 student; is that accurate?

5 A I think so.

6 MS. SNYDER: Objection, Your Honor.

7 THE COURT: Wait, wait, wait, wait, wait. Go ahead.

8 MS. SNYDER: Thank you. This is Hilarie Snyder.

9 Objection, he is leading the witness, and he's also  
10 mischaracterized his testimony.

11 THE COURT: So rephrase your question. Sustained.

12 Rephrase your question.

13 BY MR. SOUTHWICK:

14 Q Dr. Wolff, is it fair to say that you are not aware --  
15 have not been made aware -- of any specific clarification from  
16 the Office of Civil Rights about whether or not a religious  
17 exemption could be used to shield a university from an  
18 investigation of harassment as to an LGBTQ student on one of  
19 these campuses?

20 A I'm not aware of that level of clarification.

21 Q Thank you, Dr. Wolff. And, again, sorry for interrupting  
22 you. If you could continue on with the other recommendations  
23 that you made.

24 A Sure. We also recommended that OCR encourage religious  
25 colleges to allow students to form social support systems.

1 Again, that could include a general support group, that could  
2 include a student organization for the purpose of a protective  
3 mechanism against some of those depressive anxiety symptoms  
4 that come from loneliness and isolation.

5 We asked OCR to develop resources for trainings of mental  
6 health professionals and medical professionals at religious  
7 colleges about LGBTQ issues. And an example of that would be a  
8 grant program where ED or OCR or NAH would be able to support  
9 trainings for the medical and mental health professionals who  
10 work at those institutions. And we also ask for greater  
11 transparency about what a Title IX exemption means and who's  
12 requested it and why they've requested it.

13 Q Thank you, Dr. Wolff. And turning to the next exhibit,  
14 which is an email from you dated June 30th, 2021, it includes a  
15 number of Department of Ed officials as well as APA  
16 officials -- so this is a much more recent email. It looks  
17 like you are again thanking them for meeting with you and your  
18 colleagues, and that you kind of recap a few issues. Could you  
19 briefly explain this second meeting with the Office of Civil  
20 Rights?

21 A Sure. This was similar although a more comprehensive  
22 meeting because we had more people there. We had different  
23 members of the APA who could speak to different aspects of  
24 their own research or their own clinical experiences, as well  
25 as two staff members from the APA Office of Government

1 Relations. And, again, we reviewed some of our research. We  
2 reviewed some of our clinical experiences.

3 For example, Dr. Patterson is a faculty member at the  
4 University of Nevada where she spoke to working in the  
5 counseling center with LGBTQ individuals who had been harmed by  
6 religious practices. And others spoke to, again, research.  
7 Theresa Kay is an associate professor at Weber State  
8 University. She has coauthored several of the studies that  
9 I've published. We spoke to a broader understanding of those  
10 studies as a result of having a wider range of studies to be  
11 able to share with ED.

12 Q Excellent. And then it appears that you made some similar  
13 recommendations as you did back in your 2016 meeting, and that  
14 you recapped those here in this correspondence; is that  
15 accurate?

16 A I think that's fair. Those recommendations above are  
17 consistent with previous recommendations.

18 Q And, Dr. Wolff --

19 A The third one is somewhat new, but, again, it aligns with  
20 Point No. 2 there, where we're just saying psychologists are  
21 well equipped to do that kind of research.

22 Q And, Dr. Wolff, is the reason for your and APA's  
23 involvement in these meetings -- does that relate to some of  
24 the recommendations from your expert report in this case, such  
25 as out of a recognition of a need for enforcement and

1 protective actions to protect LGBTQ students at these NARUs?

2 A It is consistent with the evidence presented in my expert  
3 report, as well as multiple policy statements put forth by the  
4 American Psychological Association.

5 Q Thank you, Dr. Wolff. Nothing further from Plaintiffs.

6 THE COURT: Questions from Defendant DOJ?

7 MS. SNYDER: Yes, thank you.

8  
9 CROSS-EXAMINATION

10 BY MS. SNYDER:

11 Q Good afternoon, Dr. Wolff.

12 A Hi.

13 Q So just to understand this, the meeting that you had in  
14 2016 -- about how long was that?

15 A Hm, the length of the meeting itself?

16 Q Correct.

17 A I feel fairly confident it was a full hour.

18 Q Okay. About an hour --

19 A Yes.

20 Q -- fair to say?

21 A Yep.

22 Q And in the meeting that you had in June of this year, was  
23 that also about an hour?

24 A About 30 minutes.

25 Q Okay. So, in total, your meetings with the Office for

1 Civil Rights -- approximately an hour and a half?

2 A That's accurate, as well as then emailing them materials,  
3 including copies of the studies including APA policy  
4 resolutions, providing supplemental written materials. But the  
5 oral portion of it, yes, 90 minutes cumulatively.

6 Q Are you aware that the Office for Civil Rights issues  
7 assurance letters regarding the religious exemptions to  
8 colleges and universities when appropriate?

9 MR. SOUTHWICK: I'd object. That last bit about the  
10 appropriateness is calling on Dr. Wolff for a legal conclusion  
11 and out of the scope --

12 THE COURT: Let's rephrase.

13 MS. SNYDER: I'll rephrase it, actually. If that's  
14 okay, Your Honor, I'll just rephrase it.

15 THE COURT: Go ahead.

16 BY MS. SNYDER:

17 Q Dr. Wolff, are you aware that the Office for Civil Rights  
18 issues assurance letters regarding the religious exemption to  
19 certain colleges and universities?

20 A Yes, though I don't claim to know the legal process in  
21 depth of how they reach that conclusion.

22 Q Those letters are available on the Department of  
23 Education's public website; isn't that correct?

24 A I know they used to be. I don't know if they still are.

25 Q Nothing further. Thank you for your time.

1 A Thank you.

2 THE COURT: For the Intervenors?

3 MR. MILLER: Nicholas Miller on behalf of CCCU, and  
4 we have no questions.

5 THE COURT: Mr. Lippelmann?

6 MR. LIPPELMANN: And Mark Lippelmann on behalf of the  
7 Religious School Intervenors. Nothing further from me, Your  
8 Honor.

9 THE COURT: Thank you.

10 Any redirect?

11 MR. SOUTHWICK: No, Your Honor. This is Paul  
12 Southwick. No.

13 THE COURT: May this witness be excused?

14 THE WITNESS: Thank you, everyone.

15 THE COURT: I want to thank you --

16 MR. SOUTHWICK: Thank you, Dr. Wolff.

17 THE COURT: I want to thank you, Dr. Wolff. I know  
18 we kept you last night hoping that we would have this  
19 yesterday. So I appreciate your time --

20 THE WITNESS: No problem.

21 THE COURT: -- and bearing with us with our  
22 technology issues. Thank you very much.

23 THE WITNESS: No problem.

24 THE COURT: We're excusing Dr. Wolff, and we're going  
25 to take a recess now. And I guess I want to just confirm

1 what's remaining for this afternoon.

2 Mr. Southwick, go ahead.

3 MR. SOUTHWICK: So that closes Plaintiffs' case. So  
4 we have no further witnesses, Your Honor.

5 THE COURT: All right. For the defendant --

6 MR. SOUTHWICK: Oh, if I may though -- I'm sorry --  
7 if I may, I believe there is -- I just want to make sure that  
8 we are able to admit the expert report of Dr. Coley, which has  
9 been circulated. Dr. Coley was not a testifying witness, but I  
10 would like his report to be admitted into evidence as Exhibit  
11 No. 20 for Plaintiffs.

12 THE COURT: Objections?

13 MS. SNYDER: Yes, Your Honor. The Federal  
14 Defendants -- this is Hilarie Snyder -- would object based on  
15 hearsay.

16 THE COURT: Intervenors?

17 MR. MILLER: We'll join the Government's objection.

18 MR. LIPPELMANN: And this is Mark Lippelmann for the  
19 Religious School Intervenors. We'd also join in the  
20 Government's objection.

21 THE COURT: Objection's overruled. It will be  
22 received.

23 MR. SOUTHWICK: All right. Nothing further from  
24 Plaintiffs.

25 THE COURT: All right. Let's have an outline for



1 what the Defendant DOJ's afternoon looks like.

2 MS. SNYDER: Yes, Your Honor. This is Hilarie  
3 Snyder. We have two witnesses this afternoon. The first will  
4 be Alice Yao and the second will be Randolph Wills.

5 THE COURT: Given the length of time we took this  
6 morning with Dr. Wolff, our expert, how long do you think  
7 you'll take with your two witnesses?

8 MS. SNYDER: Well, I think collectively, between the  
9 two of them, we have probably about two to two-and-a-half  
10 hours' worth of testimony. That's for both of them, not just  
11 one. And then I'm not sure about cross obviously.

12 THE COURT: All right. That's with regard to your  
13 two witnesses.

14 And then the Intervenor -- you have one witness; correct?

15 MR. SCHAERR: That's correct, Your Honor -- Dr. Mark  
16 Regnerus.

17 THE COURT: And how long do you think that witness  
18 will take?

19 MR. SCHAERR: We anticipate about an hour for direct.

20 THE COURT: So using lawyer time as opposed to real  
21 time, since that doesn't really work in these kinds of cases, I  
22 suspect we're not -- we're going to get all the witnesses in  
23 maybe by 5:00, and then we'll address argument after that. So  
24 I'm -- that's my expectation. We'll be able to get the  
25 witnesses done today. But I'm going to be surprised if we're

1 going to have a chance to have argument today. So you might  
2 want to think about it over the lunch hour.

3 But we need to take a break. I took only one lunch break  
4 for my court reporter -- ran her until 5:30. I'm not doing  
5 that with my -- she graciously handled that yesterday. I have  
6 a different court reporter today. I'm not -- and I vowed I  
7 wouldn't do that. So it's now 12:30. So we're going to break,  
8 and we'll come back at -- we'll take an hour-and-15-minute  
9 lunch break. Because we have to -- we have to leave the  
10 building, and I need to give people a little time to get out  
11 and get back.

12 So come back at quarter 'til and we'll resume. And then  
13 maybe you'll have a chance to update me on the schedule for the  
14 rest of the afternoon. We're in recess. Thank you.

15 MR. SCHAERR: Thank you, Your Honor.

16 MR. SOUTHWICK: This is just for counsel.

17 THE COURT: Yes.

18 MR. SOUTHWICK: I was just going to suggest if  
19 counsel wanted to stay on and we could discuss a few items, or  
20 we could do that over the phone.

21 THE COURT: I'd prefer if you did it over the phone.  
22 Then I can relieve -- and my courtroom deputy and staff can  
23 actually leave the courtroom, which I think is kind of  
24 important. So I'll have you --

25 MR. SOUTHWICK: For sure.

1 THE COURT: -- you just connect up on the phone.

2  
3 (A break was taken from 12:26 PM to 1:51 PM.)

4  
5 THE COURT: Afternoon.

6 THE COURTROOM DEPUTY: Please be seated.

7 THE COURT: For the Department of Justice witnesses?

8 MS. FEDERIGHI: May it please the Court, Carol  
9 Federighi on behalf of the Defendants. I call Alice Yao to the  
10 stand.

11 THE COURT: So, two things. Please just be seated,  
12 because I can't hear you, and you're away from the mic. I  
13 can't hear you, so you're going to need to speak up.

14 MS. FEDERIGHI: Okay. So I call Alice Yao to the  
15 stand. I think she's on -- she should be on.

16 THE COURT: If your witness would just say her name,  
17 she will -- there she is -- she pops right up.

18 MS. YAO: Alice Yao.

19 THE COURT: Great. Thank you. I'm going to ask you  
20 to raise your right hand.

21  
22 A-L-I-C-E Y-A-O,  
23 called as a witness, having been first duly sworn, testified as  
24 follows:  
25

1 THE COURT: For the record, would you state your full  
2 name and spell your last?

3 THE WITNESS: Alice Yao, Y-A-O.

4 THE COURT: Thank you.

5 Go ahead, Ms. Snyder.

6 MS. FEDERIGHI: It's Ms. Federighi. Alice, I know  
7 that we've met before, but, for the record, I'm Carol  
8 Federighi. I'm also an attorney representing Defendants in  
9 this action.

10 THE COURT: Oh, wait. Excuse me. I -- who's  
11 speaking because I -- who's speaking? Who's questioning?

12 MS. FEDERIGHI: Carol Federighi.

13 THE COURT: So I can't hear you very well. So I  
14 don't know if Ms. Yao's going to be able to hear you or the  
15 other lawyers. But you're muffled and --

16 MS. FEDERIGHI: Okay. Can you hear me better now?

17 THE COURT: That's a little better for me.

18 The court reporter -- how are you doing?

19 THE COURT REPORTER: It's okay for now, but I'll let  
20 you know.

21 THE COURT: Right now she said she's okay, but she's  
22 going to let me know. But you're going to need to speak up and  
23 articulate, because I'm having a hard time hearing you.

24 MS. FEDERIGHI: Okay. Please let me know if I'm  
25 speaking too low.

1 THE COURT: Okay.

2  
3 DIRECT EXAMINATION

4 BY MS. FEDERIGHI:

5 Q Ms. Yao, where are you currently employed?

6 A At the Office for Civil Rights at the U.S. Department of  
7 Education.

8 Q And what is your position at the Department of Education?

9 A I am a supervisory attorney in the Program Legal Group.

10 Q How long have you been at the Department -- excuse me --  
11 how long have you been at the Department of Education?

12 A I first joined the Department of Education in March 2010  
13 as a staff attorney in the Program Legal Group. And I left in  
14 August of 2019. And I came back in November 2020 as a  
15 supervisory attorney.

16 Q Can you briefly describe for me your educational  
17 background?

18 A Yes. I earned my undergraduate degree from the  
19 Massachusetts Institute of Technology and my J.D. from the  
20 University of Chicago Law School.

21 Q Can you now also describe your professional background?

22 A Yes. Upon graduation from law school, I worked at a law  
23 firm. And then I clerked on the U.S. Court of Appeals for the  
24 Eighth Circuit. And then I joined another law firm before  
25 joining the Department in March 2010.

1 Q Now, you stated you worked for the Office for Civil  
2 Rights; is that correct?

3 A Yes.

4 Q And I'm just going to refer to that as OCR; is that okay  
5 with you?

6 A Yes.

7 Q Can you generally describe what OCR does?

8 A OCR enforces several federal civil rights laws pertaining  
9 to education, specifically Title VI of the Civil Rights Act of  
10 1964, Title IX of the Education Amendments of 1972, Section 504  
11 of the Rehabilitation Act of 1973, Title II of the Americans  
12 with Disabilities Act of 1990, and a couple of other federal  
13 civil rights laws.

14 Q Now, you mentioned Title IX. What is Title IX?

15 A Title IX is the federal law that prohibits sex  
16 discrimination by recipients of federal funding in education  
17 programs and activities.

18 Q So I'm going to show you on the screen what's been marked  
19 as Defendants' Exhibit 4. Can you tell me what this is?

20 A This is the statutory text of Title IX.

21 MS. FEDERIGHI: Defendants move to admit -- or  
22 Government Defendants move to admit Exhibit 4 into evidence.

23 THE COURT: Objections?

24 MR. SOUTHWICK: Paul Southwick -- no objection.

25 MR. LIPPELMANN: No objection from Mark Lippelmann,

1 counsel for Religious School Intervenors.

2 MR. SCHAERR: And Intervenor CCCU would join in the  
3 motion.

4 THE COURT: It will be received.

5 BY MS. FEDERIGHI:

6 Q What is the general structure of the Office for Civil  
7 Rights?

8 A The Office for Civil Rights has 12 Enforcement offices and  
9 also the Program Legal Group, which advises the front office.

10 Q You work for the Program Legal Group; correct?

11 A Yes.

12 Q What are the responsibilities of the Program Legal Group?

13 A We are responsible for drafting policy guidance, for  
14 engaging in rule making, for responding to correspondence from  
15 the public, reviewing documents from within the agency or from  
16 other agencies, and our team is responsible for responding to  
17 requests for assurances of religious exemptions.

18 Q I think you said you're a supervisory attorney in the  
19 Program Legal Group. What are your responsibilities as a  
20 supervisory attorney?

21 A I'm the lead for Title IX policy, and my team consists of  
22 nine staff attorneys who work on Title IX policy.

23 Q And what are your responsibilities with regard  
24 specifically to the religious exemption in Title IX?

25 A Our team is responsible for processing any requests for

1 assurances of religious exemptions.

2 Q Can you explain to me what you mean by the word  
3 "assurance"?

4 A Yes. Under the statutory language of Title IX, an  
5 educational institution may assert a religious exemption from  
6 the application of specific provisions of Title IX because  
7 they're inconsistent with the specific tenets of their  
8 controlling organization.

9 Q And specifically, again, what did you mean by the word  
10 "assurance"?

11 A They may write to the Office for Civil Rights to seek  
12 assurance that this exemption applies to them.

13 Q So are you generally familiar with OCR's policies and  
14 practices with regard to implementation of the religious  
15 exemption?

16 A Yes.

17 Q And how did you become familiar with the policies and  
18 practices?

19 A In order to perform my job duties, I have studied the  
20 statute, the relevant regulatory provisions, past guidance  
21 documents, recent rule makings, and past correspondence related  
22 to religious exemptions.

23 Q Now, I'd like to discuss the general process your office  
24 follows when it receives a request for an assurance of a  
25 religious exemption from a recipient school. And I'm going to



1 be assuming for the purposes of this first part of the  
2 discussion that the request is not related to a pending  
3 complaint filed by a student with OCR. And this is -- in that  
4 situation, what is the first step when the office receives a  
5 request?

6 A The first step is that the request is sent to me. And  
7 then I assign it to a staff attorney to review the request and  
8 draft a response.

9 Q And then what happens next?

10 A The staff attorney sends me the draft response. And I  
11 review and approve it. And then I send it to the director of  
12 the Program Legal Group for their review.

13 Q And then what steps happen after that?

14 A The director will send it to the Deputy Assistant  
15 Secretary for policy who will also review, and then finally it  
16 will go to the Assistant Secretary.

17 Q Who makes the final determination?

18 A The Assistant Secretary.

19 Q How long does it generally take to go through all those  
20 steps from receipt of the letter to the final determination?

21 A We do not have a specific timeline, but we try to process  
22 them as quickly as we can.

23 Q Now, when your office gets the request, what are the  
24 primary considerations it uses to evaluate the request?

25 A We look to the information that the educational

1 institution has provided about the controlling organization.  
2 We look to the tenets that have been articulated in the request  
3 and the specific provisions of the Title IX regulations that  
4 they point to for which compliance would conflict with those  
5 tenets.

6 Q I'm going to show you Exhibit 4 again. Can your point out  
7 to me where the religious exemption is in this statute?

8 A Yes. It is in (3) -- (a)(3).

9 Q And can you read that subsection to me?

10 A Yes. Is it okay if I look in my binder, because this is  
11 very small on my screen?

12 Q Yes, please, go ahead.

13 A It states, "This section shall not apply to an educational  
14 institution which is controlled by a religious organization if  
15 the application of this subsection would not be consistent with  
16 the religious tenets of such organization."

17 Q And is that the section that you're implementing when you  
18 evaluate the request for assurances?

19 A Yes.

20 Q How do you know what provisions of either Title IX or the  
21 regulations that they're seeking an exception from?

22 A The educational institution will provide a list in their  
23 request.

24 Q Can you give me some examples of what a typical request  
25 might look like or say?

1 A So, for example, a request will provide information about  
2 the organization that controls the educational institution,  
3 will provide some information about their religious tenets and  
4 how those tenets conflict with specific provisions of the  
5 Title IX regulations.

6 Q Can you give me a more specific example? Like an  
7 institution might seek an exemption from what exactly and in  
8 what situation?

9 A Sure. So, for example, an educational institution may say  
10 that their religious tenets require them to only train men to  
11 be religious leaders. And so, as a result, they seek an  
12 exemption from 34 CFR 106.34, which governs access to classes.

13 Q Okay. And what kind of evidence do you rely on in  
14 assessing the request for religious exemption assurance?

15 A We look to the information that they provide in the  
16 request and any supporting documentation that they may submit.

17 Q Do you try to verify what they submitted?

18 A No.

19 Q Do you look -- do any sort of background research such as  
20 look at websites or religious tracks or anything like that?

21 A The staff attorney may do a little bit -- look for a  
22 little bit more context and background. But when I review the  
23 draft response, I only look at the request and the supporting  
24 documentation provided by the educational institution.

25 Q What happens if the institution hasn't submitted

1 sufficient supporting documentation?

2 A Then we may draft a response that seeks clarification from  
3 the institution.

4 Q Do you engage in any other sort of dialogue or back and  
5 forth from the institution?

6 A No.

7 Q How is the final determination communicated to the  
8 recipient?

9 A It is through a letter signed by the Assistant Secretary.

10 Q Can you describe, generally, what this letter typically  
11 says?

12 A So the letter typically says the purpose of the letter is  
13 to respond to the institution's request for an assurance of the  
14 religious exemption. It will give a very brief summary of what  
15 the religious exemption is under the statute and under the  
16 regulations. And then it will summarize the information that  
17 was provided in the request about the religious organization  
18 that controls the institution.

19 It will summarize the tenets that were provided in the  
20 request. It will generally state that -- it will list the  
21 provisions that this educational institution is seeking an  
22 exemption from. It will also state that the assurance of the  
23 exemption is limited to the extent that application of those  
24 provisions would conflict with the religious tenets. And then  
25 it is signed by the Assistant Secretary.

1 Q Is the final letter made available to the public?

2 A Yes.

3 Q Is the request letter made available to the public?

4 A Yes.

5 Q Where can the public go and find those letters?

6 A They are posted in OCR's reading room.

7 Q Can you give us any hints on how to find it in the Reading  
8 Room?

9 A Yes. So in the Reading Room, one would go to  
10 "correspondence" and then "other correspondence." And there  
11 they would find the correspondence between OCR and the  
12 educational institution.

13 Q Do you publish a list of institutions that have religious  
14 exemption assurances on file?

15 A No. But the files are named with the name of the  
16 educational institution.

17 Q And just to clarify, when you said they were available  
18 where they were available, you mentioned Reading Room. Are you  
19 talking about a physical Reading Room?

20 A No. OCR has a virtual Reading Room on its website.

21 Q Okay. Thank you. And, I'm sorry, I didn't hear the  
22 answer to the list of institutions with religious exemption  
23 assurances on file.

24 A We do not publish a stand-alone list, but the letters are  
25 named with the name of the educational institution.

1 Q Has OCR ever denied a request for assurance of a religious  
2 exemption?

3 A There have been examples when a private undergraduate  
4 institution may have sought a religious exemption from the  
5 admissions provision of Title IX. But such institutions are  
6 already exempt under 106.15. And, in that case, we would not  
7 give an assurance of a religious exemption.

8 Q Are there any other examples where you do not fully grant  
9 a request for a religious exemption assurance?

10 A Yes. So, for example, if an educational institution cites  
11 a provision in the Title IX regulations that does not exist,  
12 then we would not grant assurance of such an exemption.

13 Q Are there any other examples you can think of where OCR  
14 didn't ever -- didn't fully grant a request --

15 A No.

16 Q -- for assurance?

17 A No.

18 Q Has OCR ever provided an assurance of a religious  
19 exemption from regulations governing sexual harassment?

20 A No.

21 Q Has a recipient school ever sought an assurance of a  
22 religious exemption from regulations governing sexual  
23 harassment?

24 A No.

25 Q I'm going to draw your attention to Government Exhibit 14.

1 If you could look at your binder. If you could tell me what  
2 this is.

3 A This is the May 2020 rulemaking that amended the Title IX  
4 regulations.

5 MS. FEDERIGHI: Okay. I'd like to move to admit  
6 Exhibit 14 into evidence.

7 THE COURT: Objections?

8 MR. SOUTHWICK: Paul Southwick -- no objection.

9 MR. SCHAERR: No objection from CCCU.

10 MR. LIPPELMANN: No objection from the religious  
11 school intervenors.

12 THE COURT: It will be received and marked. Thank  
13 you.

14 MS. FEDERIGHI: I'm just going to mute for a second  
15 while I give some instructions to the person helping me with  
16 documents.

17 BY MS. FEDERIGHI:

18 Q Okay. Thank you for your patience, Ms. Yao. Let's turn  
19 to page 11 of this -- of the PDF -- which is Federal Register  
20 Page 30478. And if you can look at the first column. The  
21 second full paragraph starts "OCR is unaware."

22 A Yes.

23 Q And if I can just wait for the document to catch up.

24 Okay. Can you read that first sentence, please?

25 A Yes. "OCR is unaware of a religious school claiming an

1 exemption from Title IX's obligations to respond to sexual  
2 harrassment on the basis that such a response conflicts with  
3 the religious tenets of an organization controlling the  
4 religious school."

5 Q Do you agree with that statement?

6 A Yes.

7 Q Has OCR ever provided an assurance of a religious  
8 exemption from regulations governing retaliation?

9 A Not that I know of.

10 Q If you could turn to Government Exhibit 7. If you could  
11 look at the first page. Do you recognize this document?

12 A Yes.

13 Q And what is it?

14 A This is the September 2020 rulemaking that amended 34 CFR  
15 § 106.12 of the Title IX regulations as well of 34 CFR Parts 75  
16 and 76.

17 Q Thank you.

18 MS. FEDERIGHI: The Government moves to admit  
19 Exhibit 7 into evidence.

20 THE COURT: Objections?

21 MR. LIPPELMANN: This is Mark Lippelmann for the  
22 Religious School Intervenors. No objection.

23 MR. SOUTHWICK: Paul Southwick -- no objection.

24 MR. SCHAERR: And none from CCCU.

25 THE COURT: Thank you. It will be received.



1 BY MS. FEDERIGHI:

2 Q If you would turn to page 33 of the PDF, which is Federal  
3 Register Page 59948, Ms. Yao. And if you would look in the  
4 second column -- the last sentence of the first full  
5 paragraph -- it starts "in this regard."

6 A Yes.

7 Q Feel free to use your binder if --

8 A Okay.

9 Q -- if the screen is too hard to read. But could you read  
10 that sentence that starts "in this regard"?

11 A Yes. "In this regard, the Department is skeptical that  
12 schools will be eligible to assert exemptions from the  
13 requirement to respond appropriately to sexual harassment under  
14 Title IX or from the prohibition on retaliation against  
15 individuals who invoke their rights under Title IX."

16 Q Thank you. Do you agree with that statement?

17 A Yes.

18 Q Now I'm going to move on to discuss how your office  
19 handles requests for religious exemption assurances in the  
20 context of a complaint that is being processed by the  
21 Enforcement section.

22 First, let's address the situation where the recipient  
23 school already has a religious exemption assurance on file.  
24 What would your office's typical involvement be in that  
25 situation?

1 A In that situation, the Enforcement office may contact the  
2 Program Legal Group to confirm the religious exemption -- or  
3 the assurance of the religious exemption -- in which case we  
4 would respond and send links to the -- to the appropriate  
5 correspondence.

6 Q And by "appropriate correspondence" you mean the letter --  
7 the request and the response letter that we talked about  
8 earlier?

9 A Yes, I do.

10 Q Okay. Once you've sent the correspondence to the  
11 Enforcement section, does the Program Legal Group have any  
12 further --

13 THE COURT REPORTER: Any further what?

14 THE COURT: Stop. Stop. That question -- the court  
15 reporter did not get the question. So go back and restate it,  
16 please.

17 BY MS. FEDERIGHI:

18 Q Once you responded to the Enforcement section with the  
19 correspondence, did the Program Legal Group have any further  
20 involvement in that case?

21 THE COURT: Okay. I'm going to tell you I could only  
22 get parts of that question. So we'll either need to adjust the  
23 mic because it was -- you are going in and out.

24 MS. FEDERIGHI: Okay. I think that it's -- I can  
25 hear an echo on your end. So I'm wondering if the courtroom

1 can mute your mic.

2 THE COURT: I have a tech right here trying to  
3 address that, but I can tell you I can't --

4 MS. FEDERIGHI: Okay.

5 THE COURT: It doesn't help if I can't hear you and  
6 the court reporter can't hear you.

7 MS. FEDERIGHI: Okay. I'll speak up.

8 THE COURT: Wait. Just wait. Please just wait.

9 MS. FEDERIGHI: (Indiscernible.)

10 THE COURT: Wait. Please just wait.

11 MS. FEDERIGHI: Okay.

12 THE COURT: Is there anything you can do?

13 MR. MOWER: Ms. Yao sounds totally clear. When she  
14 comes on, though, it's really, really muffled. So something  
15 seems to be originating from that connection on her end.

16 THE COURT: On her end --

17 MR. MOWER: Yeah.

18 THE COURT: -- with the DOJ?

19 MR. MOWER: Because, yeah, again, Ms. Yao sounds  
20 completely clear when I hear her. And I'm listening within the  
21 space here and in the courtroom, and I can hear her pretty  
22 clear.

23 THE COURT: Yao is fine.

24 MR. MOWER: Yeah.

25 THE COURT: It's the DOJ lawyer.

1 MR. MOWER: Yeah. So I don't know what it is on that  
2 end. I don't know if they've called in or if it's on their  
3 mic, but something stemming from there. We're just not getting  
4 a lot of clear audio coming through. It just doesn't sound  
5 like a great connection.

6 THE COURT: My tech -- Zak Mower -- is saying that  
7 you don't have a clear -- you don't have a clear line to us  
8 from the DOJ. Ms. Yao is fine. We're able to hear her. But  
9 when you speak, we lose the audio. It's either faint or it's  
10 muffled or it's suppressed, I guess, is what I envision. But  
11 is there another way to call in? Is there --

12 MS. FEDERIGHI: I can try -- I can hang up and try to  
13 call back in.

14 THE COURT: Why don't you try that, because it is  
15 really muffled. And I'm -- it's hard enough for the court  
16 reporter to try to do this, but it's -- I'm having trouble and  
17 straining trying to listen, and I know she's got to take it  
18 down.

19 MS. FEDERIGHI: Okay. I dialed back in. I dialed  
20 back in. Is that any better on your end?

21 THE COURT: I think that's a little bit better, but I  
22 had an echo for a minute. So I just want to make sure  
23 everybody is -- speak a little longer. I'm watching my --

24 MS. FEDERIGHI: Okay. Your Honor, is this better?  
25 Are you still hearing an echo?

1 THE COURT: I'm not hearing an echo. That's better.  
2 Let's try this. Okay? Thank you.

3 MS. FEDERIGHI: Okay. Okay.

4 BY MS. FEDERIGHI:

5 Q Ms. Yao, thanks for your patience. After the Program  
6 Legal Group has provided the correspondence to the Enforcement  
7 section, do you have any further involvement in the case?

8 A No.

9 Q Does Enforcement consult with the Program Legal Group to  
10 determine if the exemption applies to the allegations of the  
11 complaint it is considering?

12 A No.

13 Q Okay. Now, assuming, again, that there is a religious  
14 exemption assurance on file, what happens if the complainant  
15 contests whether the recipient is eligible for the exemption?

16 A In that instance, then the Program Legal Group may draft a  
17 letter to the controlling organization to seek clarification.

18 Q I'm going to turn your attention to Government Exhibit 10.  
19 If you look at that first page of that, can you tell me what --  
20 identify this document for me?

21 A Yes. This is a memorandum dated February 19th, 1985, from  
22 Harry M. Singleton, the Assistant Secretary for Civil Rights,  
23 to Regional Civil Rights Directors.

24 MS. FEDERIGHI: The Government moves to admit  
25 Exhibit 10 into evidence.

1 THE COURT: Objections?

2 MR. SOUTHWICK: No objections from Paul Southwick on  
3 behalf of Plaintiffs.

4 MR. LIPPELMANN: No objection on behalf of the  
5 Religious School Intervenors.

6 MR. SCHAEER: And none for CCCU.

7 THE COURT: Thank you. It will be received.

8 BY MS. FEDERIGHI:

9 Q Ms. Yao, can we turn to page 3 of this memo?

10 A Yes.

11 Q And can you read the first sentence of -- I mean -- excuse  
12 me -- the last sentence on the carryover paragraph?

13 A Yes. "This paragraph indicates that in the event that OCR  
14 receives a complaint against the institution, and subsequent  
15 contact with the religious organization reveals that that  
16 organization does not control the institution, then OCR will  
17 rescind any exemptions granted."

18 Q And then if you could go down further on this page and  
19 read the last sentence of the third full paragraph?

20 A Yes. "This permits a potential complainant an opportunity  
21 to dispute those tenets at which time OCR may contact the  
22 appropriate religious organization for an explanation of the  
23 practical application of tenets."

24 Q Is this the procedure that you just described to me?

25 A Yes.

1 Q And is this your understanding of what the current policy  
2 would be if the complainant disputes a religious exemption?

3 A Yes.

4 Q Now let's move on to the situation where a recipient  
5 school does not already have a religious exemption assurance on  
6 file. Does that preclude them from seeking a religious  
7 exemption in an enforcement proceeding?

8 A No.

9 Q I'm going to show you Government Exhibit 5. Do you  
10 recognize this exhibit?

11 A Yes. This is 34 CFR 106.12, which addresses religious  
12 exemptions.

13 MS. FEDERIGHI: Government moves to admit Exhibit 5  
14 into evidence.

15 MR. SOUTHWICK: Plaintiffs have no objection.

16 MR. LIPPELMANN: Religious schools have no objection.

17 MR. SCHAERR: No objection from CCCU. And we have no  
18 objection to the admission of any of these exhibits.

19 THE COURT: Document will be received.

20 BY MS. FEDERIGHI:

21 Q Is there a provision in this regulation that addresses  
22 this situation?

23 A Yes. It is 106.12(b).

24 Q Okay. Can you point me to the language in 106.12(b) that  
25 addresses that situation?

1 A Yes. It is in the middle of the provision. And it  
2 states, "In the event the Department notifies an institution  
3 that it is under investigation for noncompliance with this part  
4 and the institution wishes to set forth in paragraph (a) of  
5 this section, the institution may at that time raise its  
6 exemption by submitting in writing to the Assistant Secretary a  
7 statement by the highest ranking official of the institution,  
8 identifying the provisions of this part which conflict with a  
9 specific tenet of the religious organization, whether or not  
10 the institution had previously sought assurance of an exemption  
11 from the Assistant Secretary."

12 Q How often does this type of situation arise?

13 A It's only come up once while I've been supervisory  
14 attorney.

15 Q If it does come up, can you tell me how the request for  
16 the religious exemption assurance would be processed?

17 THE COURT: Okay. I did not hear that question, and  
18 I'm sure the court reporter didn't get it. So you need to  
19 rephrase that question?

20 MS. FEDERIGHI: If the exemption was -- excuse me --

21 MR. SOUTHWICK: This is Paul Southwick. We're  
22 getting a really bad echo.

23 THE COURT: Hold on.

24 MS. FEDERIGHI: Yeah, we are too. Trying to push  
25 through.



1 MR. MOWER: Let's try that.

2 THE COURTROOM DEPUTY: Okay. Is this better?

3 MR. MOWER: Someone else will need to speak.

4 THE COURTROOM DEPUTY: Oh, can someone else speak,  
5 please? Mr. Southwick maybe.

6 MR. SOUTHWICK: This is Paul Southwick here. I'm  
7 still hearing an echo when Carol or Ms. Yao speak,  
8 unfortunately.

9 MS. FEDERIGHI: Yeah. Let me try and speak and see  
10 if there's still an echo.

11 MR. SCHAERR: There is.

12 MS. FEDERIGHI: There is. Yeah.

13 THE COURT: You might want to try and dial in again.  
14 I don't know what else to suggest.

15 MS. FEDERIGHI: Okay. I will -- I will try again.

16 MR. SCHAERR: Carol, do you have the conference  
17 speaker that was used yesterday? That seemed to work well.

18 MS. FEDERIGHI: Hello, Your Honor. I've dialed in on  
19 my phone, and I'm using the headphones. Is this better?

20 THE COURT: I think it's a little better. And if the  
21 echo is reduced or eliminated, that would be great too.

22 MS. FEDERIGHI: Yeah. I don't hear an echo. Well,  
23 maybe now I hear a small echo.

24 Um, you got to -- you got to turn it off.

25 THE COURT: Now I hear an echo.

1 MS. FEDERIGHI: Okay. Well, we just turned off our  
2 other speaker in the room.

3 THE COURT: That should work. All right. Let's go  
4 back and --

5 MS. FEDERIGHI: Okay.

6 THE COURT: -- see where we are.

7 MS. FEDERIGHI: Okay. Sorry for the interruption.

8 THE COURT: No, it's just technology.

9 BY MS. FEDERIGHI:

10 Q So when you do receive a request for religious exemption  
11 assurance in the context of -- excuse me -- let me just back up  
12 and try to figure out where we are. So the situation is that  
13 an institution has requested a religious exemption in the  
14 course of an enforcement proceeding when there's not one  
15 already on file. How is the request processed in that  
16 situation?

17 A It is processed the same as if there was no complaint  
18 pending.

19 Q Does the Program Legal Group consult with the Enforcement  
20 Group about the complaint or about the religious exemption  
21 assurance -- either one?

22 A No, we do not.

23 Q How long does the determination on the request take?

24 A There's no specific timeline, but we try to do it as  
25 quickly as we can.

1 Q Now, we just looked at 34 CFR 106.12(b). Has that  
2 provision been recently amended?

3 A Yes. It was amended in May 2020.

4 Q What was the nature of the amendment?

5 A The amendment clarified that an educational institution  
6 does not need to assert the exemption before -- or it does not  
7 need to have the assurance of the religious exemption before  
8 asserting it in the context of an enforcement proceeding.

9 Q Did this represent a change in OCR's practices?

10 A No.

11 Q I'm going to draw your attention to Government Exhibit 14,  
12 which we already -- we looked at previously. And if you could  
13 turn to the PDF, page 8, which is page 30475 of the Federal  
14 Register Notice.

15 A Yes.

16 Q And if you look at the third column, the first full  
17 paragraph starts "contrary to." Can you read that paragraph?

18 A Yes. "Contrary to commenters who suggested that the  
19 status quo requires schools to affirmatively request an  
20 assurance letter from OCR, OCR has previously interpreted the  
21 current regulation to mean that a school can invoke a religious  
22 exemption, even after OCR has received a complaint regarding  
23 the educational institution. Additionally, the Department  
24 views both the" --

25 Q You can -- you can stop there.

1 A Oh, okay. Thank you.

2 Q Yeah. And do you agree with that statement?

3 A Yes.

4 Q Okay. Thank you. Now, we also talked about the  
5 requirement that a recipient be controlled by a religious  
6 organization to be eligible to claim a religious exemption.  
7 Did the Department of Education recently promulgate regulations  
8 implementing that requirement?

9 A Yes. In September 2020, it added 106.12(c).

10 Q Okay. I'm going to draw your attention back to Exhibit 7.  
11 Is that the rulemaking that you're talking about?

12 A Yes.

13 Q And what was your involvement in this rulemaking?

14 A I was not involved.

15 Q Are you familiar with the rulemaking?

16 A Yes, I am.

17 Q How did you become familiar with it?

18 A I reviewed it and -- so that I could perform my job  
19 duties.

20 Q Okay. Let's look back at the regulation, which is  
21 Exhibit 5. Let's look at part (c) of the regulation. Is this  
22 the new provision that was added in that rulemaking?

23 A Yes.

24 Q Okay. Now I'm going to look at each of the subsections  
25 here. And I'm going to ask you -- well, does the regulation as

1 a whole -- does anything in this regulation represent a change  
2 in previous practices followed by the agencies?

3 A No, it does not.

4 Q I'm going to look at the different provisions. Let's look  
5 first at parts (c)(1) through (c)(3). What is the evidence  
6 that these requirements were applied previously by OCR?

7 A These can be found in the assurance form from the  
8 Department of Health, Education, and Welfare, which was the  
9 predecessor to the Department of Education. And that form is  
10 from 1977.

11 Q I'm going to show you what's marked as Government  
12 Exhibit 9. Do you have that in front of you?

13 A Yes.

14 Q Do you recognize this document?

15 A Yes.

16 Q Is that the form you were just telling me about?

17 A Yes, it is.

18 Q And what in this form indicates that OCR was applying  
19 what's now in part (c)(1) through (c)(3) of the regulations?

20 A It is on page 2 in the section about religious exemptions.  
21 And at the bottom of page 2 over to page 3, it lists Sections 1  
22 through 3.

23 MS. FEDERIGHI: So she's talking about page 2 through  
24 3. Okay.

25 MR. SOUTHWICK: Can you highlight that? This is Paul

1 Southwick.

2 MS. FEDERIGHI: Yeah. Can you highlight the bottom  
3 of page 2?

4 I had to turn off the volume in the room, so the paralegal  
5 is navigating blind. I think it's there at the bottom of page  
6 2 where it says No. 1. And then it goes to the next page and  
7 there's Nos. 2 and 3 there.

8 BY MS. FEDERIGHI:

9 Q So that's the form you were just telling me about;  
10 correct?

11 A Yes, that's correct.

12 Q Okay.

13 MS. FEDERIGHI: You can stop. You can stop there.  
14 Okay.

15 BY MS. FEDERIGHI:

16 Q Were those requirements restated after 1977?

17 A Yes. They can also be found in the 1985 Memorandum from  
18 Assistant Secretary Singleton.

19 MS. FEDERIGHI: First, I'd like to move to admit  
20 Exhibit 9 into evidence.

21 MR. SOUTHWICK: No objection from Plaintiffs.

22 MR. LIPPELMANN: No objection from the Religious  
23 Schools.

24 MR. SCHAERR: Or from CCCU.

25 THE COURT: It's received. Thank you.

1 MS. FEDERIGHI: And just so the record's clear,  
2 that's now been admitted?

3 THE COURT: It was received.

4 BY MS. FEDERIGHI:

5 Q So we'll now turn to Exhibit 10. And do you see this,  
6 Ms. Yao?

7 A Yes. This is the 1985 Memorandum from Assistant Secretary  
8 Singleton.

9 Q Okay.

10 MS. FEDERIGHI: The Government would like to move to  
11 admit this exhibit into evidence.

12 MR. SOUTHWICK: No objection from Plaintiffs.

13 MR. SCHAERR: None from CCCU.

14 MR. LIPPELMANN: None from the Religious School  
15 Intervenors.

16 THE COURT: Thank you. It's received.

17 BY MS. FEDERIGHI:

18 Q And now if we could turn to page 25 of the PDF. And if  
19 you look at the bottom of -- or that page -- that page restates  
20 those same three requirements. Isn't that true, Ms. You?

21 A Yes.

22 Q Okay. And now let's turn back to the -- to Exhibit 7 --  
23 the September rulemaking -- back to page -- or to page 40 of  
24 the PDF, which is Federal Register Page 59955. And then in the  
25 third column -- the first little paragraph halfway down --

1 there's a sentence that starts "for instance." Can you read  
2 that sentence and the next sentence as well?

3 A Yes. "For instance, provisions (c)(1) through (c)(3) are  
4 consistent with guidance issued by former Assistant Secretary  
5 for Civil Rights Harry Singleton to Regional Civil Rights  
6 Directors on February 19th, 1985. To guide attorneys within  
7 OCR as to whether an educational institution may establish  
8 control by a religious organization, the guidance relied on the  
9 March 1977 version of HEW Form 639A, which was issued by the  
10 former U.S. Department of Health, Education, and Welfare."

11 Q Are those the two sources we were just talking about?

12 A Yes, they are.

13 Q Now, let's go back to the regulations -- Exhibit 5. --  
14 look at page 2, part (c)(4). What is the evidence that this  
15 regulation was previously applied by OCR?

16 A This was also articulated in the 1989 Memo from Acting  
17 Assistant Secretary Smith.

18 Q I'm going to show you Government Exhibit 11. Can you take  
19 a look at that? And is this the memo you were just referring  
20 to?

21 A Yes, it is.

22 Q Okay.

23 MS. FEDERIGHI: Government moves to admit Exhibit 11  
24 into evidence.

25 MR. SOUTHWICK: No objection from Plaintiffs. And



1 Plaintiffs in fact agree to admit all of Government exhibits.

2 MR. LIPPELMANN: No objection from the Religious  
3 School Intervenors. We also have no objection to any  
4 Government exhibit.

5 MR. SCHAERR: And same is true for the CCCU  
6 Intervenors.

7 THE COURT: Thank you. This is received and --

8 MS. FEDERIGHI: Okay. Thank you.

9 BY MS. FEDERIGHI:

10 Q So let's turn to page 2 of the memo.

11 THE COURT: Wait, wait. Wait a minute. For the  
12 record --

13 BY MS. FEDERIGHI:

14 Q And is there a place on this page (indiscernible) --

15 THE COURT: Wait. Counsel, will you wait a second?

16 MS. FEDERIGHI: (Indiscernible.)

17 THE COURT: Wait. Counsel.

18 THE COURT REPORTER: I don't think she can hear you.

19 MR. MOWER: Counsel, hold on one moment, please.

20 MS. FEDERIGHI: Sure.

21 THE COURT: Am I on?

22 THE COURTROOM DEPUTY: It looks like you're on.

23 THE COURT: I was trying to interrupt to say the  
24 exhibit's received and the remainder of the Government's  
25 evidence as noted will be deemed admitted. So you don't need

1 to go through that process.

2 So let's go back and pick up the question after you just  
3 moved on that last exhibit, because I think the court reporter  
4 did not get it because -- and I certainly didn't hear it.

5 MS. FEDERIGHI: Okay. Thank you, Your Honor.

6 BY MS. FEDERIGHI:

7 Q Is there a part -- a place on this page 2 that indicates  
8 that part -- what's now part (c)(4) was the previous standard  
9 applied by OCR?

10 A Yes. It is in the paragraph marked 1.

11 Q Okay. Thank you. Now, let's go back to the rulemaking,  
12 which is Exhibit 7. And, again, on page 40, which is Federal  
13 Register Page 59955. And, again, in the third column, the last  
14 sentence of that first full paragraph starts "proposed  
15 provisions." Can you read that sentence to me?

16 A Yes. "Proposed provisions (c)(4) and (5) also are  
17 consistent with the letter from Acting Assistant Secretary for  
18 Civil Rights William L. Smith to OCR's senior staff."

19 Q Now, we've been talking about (c)(4). But this sentence  
20 talks about (c)(4) and (c)(5). What is (c)(5) in this context?

21 A Proposed Provision 106.12(c)(5) referred to moral beliefs  
22 and practices, and it was not included in the final rule.

23 Q Okay. So with the exception of deleting (c)(5) then from  
24 this sentence, is that consistent with the -- this is stating  
25 that this is consistent with prior -- (c)(5) -- (c)(4) is

1 consistent with prior practice; correct?

2 A That's correct.

3 Q Now, let's go back to the regulation -- part (c)(5) on  
4 page two -- and can you read that section to me?

5 A Yes. "That the educational institution has a published  
6 institutional mission that is approved by the governing body of  
7 an educational institution, and that includes, refers to, or is  
8 predicated upon religious tenets, beliefs, or teachings."

9 Q Now, what -- why do you think that this provision is  
10 consistent with past OCR practice?

11 A This is consistent with OCR's past practice of recognizing  
12 that educational institutions may have a variety of different  
13 governing structures and that the religious organization need  
14 not be a separate legal entity from the educational  
15 institution.

16 Q Let's go back to page 40 of Exhibit 7, which is the  
17 September rulemaking. Again, it's Federal Register Page 59955.  
18 And I'm looking at the last two sentences of the second full  
19 paragraph. Starts with "Section 106.12(c)(6)." What is the  
20 reference to (c)(6) in this context?

21 A So this is a reference to Proposed 106.12(c)(6), which, in  
22 the final rule, was 106.12(c)(5) because the Proposed  
23 106.12(c)(5) was deleted.

24 Q Okay. Thank you. Can you read those two sentences to me?

25 A Yes. "Section 106.12(c)(6) as proposed is consistent with

1 longstanding OCR practice in recognizing this principle. For  
2 example, OCR has long recognized that a school or department of  
3 divinity is an educational institution controlled by a  
4 religious organization without any requirement that the school  
5 or department of divinity be controlled by a religious  
6 organization that is organized as a separate legal entity from  
7 the educational institution itself."

8 Q Thank you. What does this notice mean when it talks about  
9 a separate legal entity?

10 A So, for example, an educational institution may be  
11 governed by a board of trustees that is not a separate legal  
12 entity from the school.

13 Q Can you give me some examples of that?

14 A An example would be Bob Jones University.

15 Q What kind of controlling organization does Bob Jones have?

16 A They have a board of trustees that is not legally separate  
17 from the university.

18 Q So can an educational institution qualify for the  
19 religious exemption if it doesn't have an external controlling  
20 organization?

21 A Yes.

22 Q Has that always been OCR's policy?

23 A Yes.

24 Q Okay. Let's go back to the regulation and look at the  
25 last section -- part (b)(6) -- on page 2. Can you read that

1 section to me -- the last section?

2 A Yes. "Other evidence sufficient to establish that an  
3 educational institution is controlled by a religious  
4 organization pursuant to 20 USC 1681 § (a)(3)."

5 Q And why do you think this is consistent with past  
6 practice?

7 A Because OCR has had a practice of considering any evidence  
8 that an educational institution submits that establishes that  
9 it is controlled by a religious organization.

10 Q Let's go back to the rulemaking. And now I'm on page 46  
11 of the PDF, which is Federal Register Page 59961. And the  
12 first sentence -- full sentence -- in the third column starting  
13 with "the Department" -- can you read me that sentence?

14 A Yes. "The Department has always carefully considered the  
15 evidence submitted when evaluating a religious exemption from  
16 Title IX. And given the wide array of recipients with  
17 different structures of belief systems, the Department has  
18 determined that it is appropriate to provide some flexibility  
19 in the types of evidence that would be sufficient to establish  
20 eligibility for the religious exemption."

21 Q Do you agree with that statement?

22 A I do.

23 Q Now, just a few more questions. What role is your office  
24 playing in the processing of the administrative complaint filed  
25 by the Plaintiffs in this case?

1 A We do not have a role.

2 Q What communications have you had with the Enforcement  
3 staff, if any, in connection with the administrative complaints  
4 filed by the Plaintiffs in this case?

5 A Some Enforcement offices have reached out to the Program  
6 Legal Group to ask whether some of the schools named in the  
7 complaint have a religious exemption or not. But they have not  
8 specified the specific OCR complaint that they are referring  
9 to --

10 Q Have you --

11 A -- or that it is in connection with.

12 Q Excuse me. Have you responded to those reach-outs by the  
13 Enforcement section?

14 A Yes, we have.

15 Q What was the substance of your response?

16 A To confirm whether the educational institution has an  
17 assurance of a religious exemption, and, if so, then we send  
18 links to the relevant correspondence with OCR.

19 Q Have you had any further communications with the  
20 Enforcement staff about the religious assurances with regard to  
21 those schools?

22 A No, we have not.

23 Q Okay. No further questions.

24 THE COURT: Let's start with -- for the Plaintiffs.  
25 Go ahead -- cross.

1 MR. SOUTHWICK: Thank you, Your Honor. Your Honor,  
2 I'm -- I will likely show Ms. Yao some documents during my  
3 cross. And I'm having our staff circulate those to Counsel and  
4 Court as exhibits to use on cross.

5  
6 CROSS-EXAMINATION

7 BY MR. SOUTHWICK:

8 Q All right. Ms. Yao, thank you for being here today and  
9 for providing a very thorough explanation of the application of  
10 the religious exemption and the interactions with prior  
11 memorandum. I'm going to ask you some follow-up questions to  
12 those that were asked by Counsel for Government Defendants.

13 So, first, I'd like us to turn to Government Exhibit No. 5  
14 that we were looking at previously. And these are -- this is  
15 the CFR 106.12 -- the regulation -- the new regulation  
16 regarding control by a religious organization.

17 Ms. Yao, you had read from (b) regarding the assurance of  
18 exemption. And what I want to note here is the current version  
19 says "an educational institution that seeks assurance of the  
20 exemption set forth in paragraph A of this section may do so by  
21 submitting in writing to the Assistant Secretary." So the  
22 current version of the rule uses the word "may"; is that  
23 correct?

24 A Yes.

25 Q And are you aware of what the prior verb was in that

1 regulation?

2 A I don't recall at this moment. No.

3 Q Did you review the prior regulation in contrast to the  
4 current regulation in preparation today?

5 A I did. But I don't remember the verb right now.

6 Q So would it refresh your recollection if I let you know  
7 that the prior verb was "shall" -- that the regulation used the  
8 word "shall do so by submitting in writing to the Assistant  
9 Secretary"; does that sound accurate to you?

10 A Yes.

11 Q All right. So there has in fact been a change of language  
12 from "shall" to "may"; is that right?

13 A Yes.

14 Q Okay. So the language has changed from mandatory to  
15 permissive; wouldn't that be fair to say?

16 A In the change of that verb it did, but the (indiscernible)  
17 has remained the same.

18 THE COURT REPORTER: But the what has remained the  
19 same?

20 BY MR. SOUTHWICK:

21 Q So OCR's practice --

22 THE COURT: Stop. Stop. Wait. Stop.

23 THE COURT REPORTER: I don't have a mic in the  
24 courtroom, so they can't hear me.

25 THE COURT: The court reporter interrupted. She



1 didn't get the answer.

2 BY MR. SOUTHWICK:

3 Q Ms. Yao, I'll go ahead and repeat my question, and if you  
4 could repeat your answer as you gave it as best as you can  
5 recall. So I said in this context the verb changed from  
6 "shall" to "may." It changed it from a mandatory to a  
7 permissive action in terms of requesting the statement; is that  
8 correct?

9 A Yes. And I responded that the verb change that you're  
10 describing is correct, but that the practice has always  
11 remained the same.

12 MR. SOUTHWICK: Was the court reporter able to get  
13 that? I know for me at least it was a little bit --

14 THE COURT REPORTER: I read her lips. "Remained the  
15 same."

16 THE COURT: She said "remains the same." We could  
17 barely hear it, but we heard "remains the same."

18 MR. SOUTHWICK: Did you get the earlier part about,  
19 yes, with respect to the --

20 THE COURT: Yes. The word changed from mandatory to  
21 permissive, but it remained the same operationally is what she  
22 said -- something very close to that.

23 BY MR. SOUTHWICK:

24 Q All right, Ms. Yao. So is it your testimony that OCR  
25 practice failed to conform to the requirements of the

1 regulation because OCR practice made it permissive but the  
2 language of the regulation made it mandatory?

3 A No.

4 Q So can you explain that to me? If the regulation used the  
5 word "shall," a mandatory verb, but the Office of Civil Rights  
6 on its own informal policies said permissive, how is OCR  
7 complying with its own regulations?

8 A The provision speaks to an educational institution that  
9 seeks assurance of the exemption. And they do not need that  
10 assurance in order to invoke the religious exemption, even in  
11 the context of an enforcement proceeding.

12 Q Well, that's what you're saying was the informal practice  
13 of OCR; right? But that's not the language that the regulation  
14 requires; is it?

15 MR. SOUTHWICK: Oh, Carol, are you attempting to make  
16 an objection? I don't want to -- it sounds like you were maybe  
17 trying to object there. So I don't want to continue if  
18 you're -- I don't think Carol can hear us. I'll go ahead and  
19 wait, Ms. Yao. I don't want you to be without counsel.

20 THE COURT: I can't hear her say anything, and she's  
21 texting. And so I don't have any --

22 MS. FEDERIGHI: Yes, Your Honor. I got muted again.  
23 I got muted. So I was trying to make objections that he was  
24 calling for legal conclusions several questions ago. And I had  
25 to hang up and redial in. So if you could ask the staff not to

1 mute a number that starts (202) 415 -- or 451 -- I can't  
2 remember what my actual number is.

3 THE COURTROOM DEPUTY: I haven't muted anyone.

4 THE COURT: No one has been muted. We haven't muted  
5 anyone.

6 MR. MOWER: I may have.

7 THE COURT: Hold on. One of our techs -- our tech  
8 may have muted you. But people need to be muted so that we  
9 don't have background noise. So it's just -- it's a trade-off.  
10 So you need to mute your --

11 MS. FEDERIGHI: I need to be able --

12 THE COURT: You need to mute, and we won't mute you.  
13 Okay? And then you come off mute if you want to object.

14 MS. FEDERIGHI: Could we back up to the question  
15 where he was asking whether OCR was in compliance with the  
16 statutes?

17 MR. SOUTHWICK: Sure. This is Paul Southwick. I'm  
18 ready to resume again. It sounds like you're ready, Carol.

19 MS. FEDERIGHI: Yes, I'm ready.

20 MR. SOUTHWICK: Okay. Is the Court ready?

21 THE COURT: We're ready.

22 BY MR. SOUTHWICK:

23 Q Ms. Yao, just for the record, it appears your lawyer was  
24 without access to make objections. So we're going to kind of  
25 go back on some of the prior questioning and allow your

1 attorney the opportunity to object. So I'll kind of start over  
2 a little bit with -- on Exhibit No. 5, we were reading some of  
3 the language about (b), assurance of exemption, a change from  
4 "shall" to "may."

5 And one of my questions to you was can you explain how the  
6 Office of Civil Rights' practice of making an exemption  
7 assurance permissive -- how did that comply with the existing  
8 regulations when the existing regulations used the word  
9 "shall," a mandatory term?

10 MS. FEDERIGHI: Objection, calls for a legal  
11 conclusion.

12 MR. SOUTHWICK: My response is I'm asking for  
13 Ms. Yao, who is part of the Program Legal Department here, for  
14 her understanding of how the OCR practice conformed with the  
15 regulations, which I don't think calls for a legal conclusion.  
16 But...

17 THE COURT: Overruled. Go ahead. Answer the  
18 question.

19 THE WITNESS: My understanding is that this  
20 regulation addresses an educational institution that seeks  
21 assurance of the exemption, and an educational institution is  
22 not required to have that assurance before invoking the  
23 exemption, even in the context of an enforcement proceeding.

24 BY MR. SOUTHWICK:

25 Q So what is your understanding, then, of why the language

1 needed to change from "shall" to "may"?

2 MS. FEDERIGHI: Objection, calls for a legal  
3 conclusion. Lack of foundation.

4 THE COURT: There was an objection. I have no idea  
5 what it was. Couldn't hear a thing other than --

6 MS. FEDERIGHI: Objection, lack of foundation.

7 THE COURT: "Objection" something --

8 THE COURT REPORTER: Lack of foundation. Calls for a  
9 legal conclusion.

10 THE COURT: Go ahead. Sustained.

11 MS. FEDERIGHI: Lack of foundation.

12 THE COURT: That's better. That's the best of all of  
13 them. I don't know what you did differently.

14 MS. FEDERIGHI: Well, I'm just on my headphones and  
15 no one else in the room can hear. I'm on my own here, guys.

16 THE COURT: Aren't we all. So, anyways,  
17 Mr. Southwick, why don't you lay a foundation.

18 BY MR. SOUTHWICK:

19 Q Ms. Yao, one of the roles that you have held with the  
20 Program Legal Group in the past and again now is you're in  
21 charge of making sure that the Office of Civil Rights complies  
22 with the regulations regarding assurances of exemption; is that  
23 true?

24 A No.

25 Q All right. Can you describe for the Court again what your

1 role with the Program Legal Group is? My understanding was  
2 that you have some involvement with the processing of  
3 assurances of exemption. Can you describe that again, please?

4 A Yes. So the religious exemption -- the request for an  
5 assurance of the religious exemption comes to the Program Legal  
6 Group and to me. And it is processed by my team. And then it  
7 is reviewed by the Director of the Program Legal Group, by the  
8 Deputy Assistant Secretary for Policy, and then finally by the  
9 Assistant Secretary.

10 Q Is it your understanding when -- when you worked in the  
11 Program Legal Group previously -- the 2010 to 2019 period --  
12 did the regulations -- not the internal policy of OCR -- but  
13 did the regulations state that an institution was merely  
14 permitted to seek an assurance, or did the regulations state  
15 that it shall seek an assurance?

16 A I'd have to look back at the text. But from what you  
17 explained earlier, I believe it said, "An educational  
18 institution that seeks assurance of the exemption set forth in  
19 paragraph A of this section shall do so by submitting in  
20 writing to the Assistant Secretary."

21 Q So now that it's changed, and they use the word "may," and  
22 it specifically says an institution is not required to seek an  
23 assurance in order to assert such an exemption -- and I believe  
24 your testimony is that is OCR's current policy; is that  
25 correct?

1 A Yes.

2 MS. FEDERIGHI: Objection, misstates the policy  
3 (indiscernible) --

4 THE COURT REPORTER: I couldn't hear her.

5 THE COURT: We have no idea what you said.

6 MS. FEDERIGHI: Objection, misstates past testimony.

7 THE COURT: Rephrase your question, Mr. Southwick.

8 BY MR. SOUTHWICK:

9 Q Ms. Yao, is it OCR's current policy that an institution is  
10 not required to seek assurance from the Assistant Secretary in  
11 order to assert a religious exemption?

12 A They are not required to seek assurance before asserting  
13 the religious exemption during an enforcement proceeding.

14 Q So I want to unpack that a little bit. So if an  
15 educational institution has a complaint -- a Title IX  
16 complaint -- filed against it -- let's say by one of the  
17 plaintiffs in this case -- and there is no assurance of  
18 exemption on file at OCR -- that's a possibility; correct?  
19 Because not every religious college has an assurance with  
20 exemption; is that right?

21 A That's right.

22 Q All right. So in an instance where a plaintiff files a  
23 Title IX complaint for sexual orientation or gender identity  
24 discrimination against a religious educational institution that  
25 does not have an assurance of exemption on file, that religious

1 educational institution is allowed -- in the context of that  
2 complaint -- is allowed to respond by asserting a religious  
3 exemption that could then retroactively apply to the  
4 plaintiff's complaint; is that accurate?

5 A No.

6 MS. FEDERIGHI: Objection, mischaracterizes  
7 testimony.

8 THE COURT: Well, I -- overruled. Because I think  
9 that question doesn't necessarily go to what the testimony was.  
10 It was just a flat-out fact question on procedure.

11 Am I right, Mr. Southwick?

12 MR. SOUTHWICK: Yeah. That's what I was trying to  
13 get clarification on.

14 THE COURT: So why don't you ask it again.

15 Please listen carefully.

16 BY MR. SOUTHWICK:

17 Q So, Ms. Yao, if one of the plaintiffs filed a Title IX  
18 complaint with the Office of Civil Rights for sexual  
19 orientation discrimination against a religious educational  
20 institution that does not have an assurance of exemption on  
21 file, that religious educational institution would be given an  
22 opportunity to assert an assurance of exemption in the context  
23 of that Title IX complaint evaluation; is that accurate?

24 A Yes.

25 Q And then if -- if -- are you able to hear me okay,



1 Ms. Yao?

2 A Yes, I am.

3 Q Okay. Then if the educational institution at that stage  
4 asserts a religious exemption with respect to OCR regulations  
5 regarding sexual orientation, the Office of Civil Rights would  
6 then need to make a determination of whether or not to grant  
7 that religious exemption; is that correct?

8 MS. FEDERIGHI: Objection, calls for a hypothetical.

9 THE COURT: Overruled. Answer -- you can answer the  
10 question.

11 THE WITNESS: Can you repeat the question one more  
12 time, please?

13 BY MR. SOUTHWICK:

14 Q Sure. A plaintiff files a Title IX complaint for sexual  
15 orientation discrimination against a religious educational  
16 institution that does not have an assurance of exemption on  
17 file. Then you testified that that educational institution  
18 would be given an opportunity in the context of this complaint  
19 to assert a religious exemption in compliance with OCR  
20 regulations regarding sexual orientation discrimination; is  
21 that correct?

22 A Yes.

23 Q Once the institution asserts that religious exemption,  
24 then what would OCR do next?

25 A Then the request of the religious exemption would come to

1 the Program Legal Group, and we would evaluate that request and  
2 draft a response to the request.

3 Q And if the Program Legal Group was satisfied that the  
4 educational institution met the control tasks and otherwise  
5 conformed to the regulations in terms of requesting that  
6 religious exemption, the Program Legal Group would then issue  
7 an assurance of exemption to that institution; is that correct?

8 A No. The Assistant Secretary would issue that assurance,  
9 not the Program Legal Group.

10 Q Okay. When the institution asserts the religious  
11 exemption, is that going to the Program Legal Group, or does  
12 that go directly to the Assistant Secretary first?

13 A It comes to the Program Legal Group, and then we draft a  
14 response -- a recommended response -- and then it goes through  
15 the various layers, through the Assistant Secretary, who then  
16 issues the final response.

17 Q Thank you. All right. So in this scenario, let's say the  
18 Assistant Secretary grants the religious exemption in the  
19 context of this pending Title IX complaint. All right. So the  
20 religious exemption is now granted. Then what happens to that  
21 Title IX complaint, given the assurance of exemption that  
22 issues? And I guess I'll break it down a little bit. Where  
23 does that Title IX complaint go next?

24 A That Title IX complaint is never handled by the Program  
25 Legal Group. It stays with Enforcement. We only handle the

1 request for the assurance of the religious exemption.

2 Q All right. So if Program Legal Group makes a  
3 recommendation to get the assurance, the Assistant Secretary  
4 agrees with that recommendation, issues the assurance, and then  
5 that Title IX complaint -- which prompted this assurance of  
6 exemption -- that would then go with the Enforcement Division.  
7 And the Enforcement Division would then look at the religious  
8 exemption that was granted, compare it to the allegations in  
9 the Title IX complaint, and make a recommendation on whether to  
10 dismiss the complaint based on the exemption or to open the  
11 complaint for an investigation; is that accurate?

12 A I don't work for Enforcement. I only receive the request  
13 for the assurance of the religious exemption. I don't review  
14 the complaint, and I do not know how they handle it.

15 Q Okay. So you have no idea what happens to that complaint?

16 A I have never worked in Enforcement.

17 Q All right. So in terms of Program Legal Group's role, its  
18 role is it can issue that assurance of exemption even in the  
19 context of a pending Title IX complaint. And then there's a  
20 different department that decides what happens to that Title IX  
21 complaint in light of the assurance of the exemption; is that  
22 right?

23 A That's correct.

24 Q All right. And so I'll go ahead and ask Mr. Wills about  
25 what happens next when he's on to testify. All right.

1 Ms. Yao, you testified that -- you testified a lot about the  
2 control test. And the control test has now been codified in  
3 Government Exhibit 5, 106.12(c), Eligibility. Is that correct?  
4 Is that your understanding?

5 A Yes, it is.

6 Q And I believe that you testified that (c) is consistent  
7 with prior OCR practice in all respect; is that accurate?

8 A Yes, it is.

9 Q Well, I'd like to turn your attention to an exhibit that  
10 Plaintiffs will offer here. And I believe that these have been  
11 circulated to the Court, but I will pull them up as well. But  
12 the first document I'm going to look at is the Dordt College  
13 response document. And I will pull that up here.

14 MR. SOUTHWICK: I'm just going to look through  
15 something here real quick. Okay. I'd like to introduce this  
16 document that I have here of Dordt College, which is a response  
17 from the Office of Civil Rights to Dordt College's request for  
18 a religious exemption. I'd like to introduce it as Plaintiffs'  
19 21. Any objections?

20 MS. FEDERIGHI: Objection, this exhibit was not on  
21 Plaintiffs' witness list -- I mean exhibit list.

22 MR. SOUTHWICK: We're using this for cross only.

23 THE COURT: For the Intervenors, any objection?

24 MR. LIPPELMANN: Your Honor, the Religious School  
25 Intervenors would join in the Government's objection. I mean,

1 I will note that the -- at least CCCU and the Defendants  
2 included exhibits that they may or may not have used on  
3 cross-examination.

4 MR. SCHAERR: CCCU also joins in the objection.

5 THE COURT: Overruled. It will be received.

6 BY MR. SOUTHWICK:

7 Q Ms. Yao, I'd like to ask you some questions about  
8 Exhibit 21, which is this Dordt College document here. And  
9 before I do that, do you recall when you were serving at the  
10 Department of Education in that first period of 2010 to 2019 --  
11 do you recall whether or not the Program Legal Group received  
12 what might be called a flurry, or a significant increase at  
13 least, in religious exemption requests after President Obama  
14 issued a determination that sex discrimination would include  
15 gender identity and sexual orientation discrimination? So this  
16 is the period roughly 2013 to 2016.

17 I'll ask my question again a little bit more specifically.  
18 Would you say that there was an uptick in requests for  
19 religious exemptions roughly during that time frame?

20 A Yes, I recall that.

21 Q And what is your understanding of why there was an uptick  
22 in religious exemption requests during that period of time?

23 A My understanding is that the Department had resolved  
24 complaints based on gender identity. And schools had agreed to  
25 treat transgender students consistent with their gender

1 identity, which may have prompted additional requests for  
2 assurances of religious exemptions.

3 Q And indeed there were dozens of religious exemption  
4 requests that came through during this time period; is that  
5 correct?

6 A I don't recall the number.

7 Q But we could look it up on the Department of Education's  
8 website, which lists the response and requests, and we would --  
9 we would see that -- how many schools that was; is that right?

10 A That's correct.

11 Q Okay. So I can just, you know, tell you that nearly 100  
12 schools did that since 2013 to the present. And, you know, if  
13 you want, you can go through each and every one of those. I  
14 don't think we have to. But what I want to ask is during this  
15 period --

16 MS. FEDERIGHI: Objection, counsel's testifying.

17 THE COURT: Overruled. Let's move on. Let's ask the  
18 question, Mr. Southwick.

19 MR. SOUTHWICK: All right.

20 BY MR. SOUTHWICK:

21 Q Ms. Yao, were you involved in making decisions with  
22 respect to any of these religious exemption requests?

23 A No, I was not.

24 Q Okay. So that was in a different -- you were not working  
25 on these issues at that time?

1 A No, I was not.

2 Q Okay. But you are now?

3 A Yes.

4 Q All right. So I want to ask you -- this is an assurance  
5 of exemption going with respect to Dordt College. And I'm  
6 going to ask you about some language towards the end of this  
7 grant -- this assurance grant. And let's go on down here. And  
8 this letter comes from the Assistant Secretary for Civil  
9 Rights, which was Catherine Lhamon at the time. And that's  
10 consistent with your prior testimony, correct, that ultimately  
11 the assurance would get to you from the Acting Assistant  
12 Secretary?

13 A Yes.

14 Q Okay. Now, this last paragraph states, "Please note that  
15 this letter should not be construed to grant exemption from the  
16 requirements of Title IX and the regulation, other than as  
17 stated above. In the event that OCR receives a complaint  
18 against your institution, we are obligated to determine  
19 initially whether the allegations fall within the exemption  
20 herein granted. Also in the unlikely event that a complainant  
21 alleges that the practices followed by the institution are not  
22 based on the religious tenets identified in your request, OCR  
23 is obligated to identify a controlling organization to contact  
24 to verify those tenets."

25 Is that a correct reading of the document?

1 A Yes.

2 Q And are you familiar with this language? "OCR is  
3 obligated to identify a controlling obligation." Have you seen  
4 this language before?

5 A Yes.

6 Q Is it language that you currently use?

7 A No.

8 Q And what's the language that you currently use?

9 A I believe in the most recent responses to requests for  
10 assurances for religious exemptions that this paragraph is much  
11 shorter and does not include this sentence.

12 Q I guess what I'm asking, Ms. Yao, is are you familiar with  
13 the practice of OCR during this period, including language like  
14 this where OCR was unable to determine whether or not there was  
15 an external controlling organization? Are you familiar with  
16 that at all?

17 A Can you repeat the question?

18 Q Sure. I'm trying to see if the Government has provided an  
19 exhibit here that shows the other language. Give me one  
20 second. Well, I'll just note that Government Exhibit 6 --  
21 which is about Bob Jones University -- earlier -- if we can  
22 pull up Government Exhibit 6. Do you have access to Government  
23 Exhibit 6, Ms. Yao?

24 A Yes. I have it in the binder in front of me.

25 Q Great. All right. That's another issuance of an



1 exemption letter. And earlier you testified that in terms of a  
2 university that does not have an external controlling  
3 organization, you named Bob Jones University as one of those  
4 institutions; is that right?

5 A Yes.

6 Q And so I'd like to turn to the last page of Exhibit No. 6,  
7 which is ED2.000253, where there is very similar language to  
8 the -- or the exact language -- as appears in this Dordt  
9 College example where it also says, "In the unlikely event that  
10 the complainant alleges that the practices followed by the  
11 institution are not based on the religious tenets identified in  
12 your request, OCR is obligated to identify a controlling  
13 organization to contact to verify those tenets." Do you see  
14 that language?

15 A I do.

16 Q And in fact there's no language in there referring to the  
17 eligibility criteria on Government Exhibit 5 -- the eligibility  
18 criteria in (c) -- about school or department of divinity,  
19 engaging in religious practices -- you know (1), (2), (3), (4),  
20 (5), or (6) -- none of that is in fact referenced throughout  
21 this response letter; is that correct?

22 A No.

23 Q And so in fact OCR was not following the Singleton Memo or  
24 any of those policies and practices that you were just talking  
25 about earlier, because both in this Bob Jones example and also

1 in the Dordt College letter, there is absolutely no discussion  
2 of any of those factors. Is that fair to say that the letters  
3 have no discussion of those factors?

4 A No. I think you misunderstood my prior response. I said,  
5 "No, that was not correct."

6 Q Can you explain that response, please?

7 A Yes. In the Bob Jones letter on page 251 -- the first  
8 page of OCR's response -- the third paragraph discusses the  
9 information that was provided in the request about the board of  
10 trustees.

11 Q Right. It discusses that information. But is there any  
12 conclusion made in this letter that the board of trustees  
13 satisfies the control test or that the board of trustees is a  
14 controlling religious organization?

15 A No.

16 Q And in fact the opposite is true. It says "in the event  
17 that someone challenges this exemption, OCR will actually have  
18 to identify the controlling organization"; is that true?

19 A Yes.

20 Q So your earlier testimony isn't completely accurate; is  
21 it? The OCR has not consistently followed the eligibility  
22 criteria on Exhibit No. 5 in handling these exemption request  
23 and response letters. Isn't that in fact the case?

24 A No, it is not.

25 Q Can you explain why -- in light of what we just went

1 over -- how your prior testimony remains fully accurate?

2 A Yes. In this letter, OCR granted the assurance of the  
3 religious exemption, which means that OCR went through all of  
4 the required elements of a religious exemption before granting  
5 that assurance. Even if it was not explicitly stated in the  
6 letter, we must have determined that they satisfied that part  
7 of the statute in order to grant that assurance.

8 Q Okay. Well, then I'd like to turn your attention to a  
9 similar letter but with very different language. So let me  
10 pull -- I'll pull this up here. So I'm going to point your  
11 attention -- pull this up -- whoops -- okay.

12 Ms. Yao, I'm going to ask you about this letter on my  
13 screen. And I'm not moving to enter this into evidence or  
14 anything, but this is for our professional purposes. This is  
15 an additional religious exemption response letter to Brigham  
16 Young University-Idaho, an LDS institution. And in this  
17 response letter, it goes through very similar things about the  
18 types of control and religious tenets regarding gender and  
19 gender identity. And it goes on to grant these exemptions.

20 And the paragraph -- the end paragraph is notably  
21 different than the end paragraph in the Bob Jones and the Dordt  
22 College example. And so I'm going to read that language to  
23 you. This ending language says, "Also in the unlikely event  
24 that a complainant alleges that the practices followed by the  
25 institution are not based on the religious tenets of the

1 controlling organization, OCR is obligated to contact the  
2 controlling organization to verify those tenets."

3 So in this letter, it said that it's going to contact the  
4 controlling organization, not that it will have to identify a  
5 controlling organization. Is that fair to say that that's how  
6 these documents read?

7 A Yes.

8 Q So in fact OCR has at times issued exemption letters where  
9 in fact it has not identified a controlling religious  
10 organization such as in the Bob Jones University example, the  
11 Dordt College example that we've just looked at; is that fair  
12 to say?

13 MS. FEDERIGHI: Objection --

14 THE WITNESS: No.

15 MS. FEDERIGHI: -- mischaracterizes testimony.

16 BY MR. SOUTHWICK:

17 Q And, Ms. Yao, can you explain to the Court today why in  
18 certain circumstances OCR said that it will contact the  
19 controlling organization, but in other circumstances it said  
20 obligated to identify controlling organization?

21 A I did not work on these letters, but I think that the  
22 language in the letters may vary based on the staff attorney  
23 who is writing the letter.

24 Q But these letters all have to come out from the Assistant  
25 Secretary themselves; right? So, ultimately, they are coming

1 from the Assistant Secretary from the Office of Civil Rights  
2 regardless of which person writes certain language in those  
3 letters; is that right?

4 A Yes.

5 Q All right. Ms. Yao, I want to move on to a different  
6 topic. And this has to do with the -- not the control test --  
7 but where there's an inconsistency with religious tenets. And  
8 the -- I'd like to turn to Government's Exhibit No. 7. And  
9 this was relating to whether or not a religious exemption would  
10 be able to be a surrogate with respect to harassment  
11 allegations.

12 And I want to ask you a little bit about -- so this is  
13 Government Exhibit 7. And I believe you were reading from what  
14 is Bates Stamped ED2.000206. And your attorney was  
15 highlighting a paragraph from the middle column where it says,  
16 "In this regard, the department is skeptical that schools will  
17 be eligible to assert exemptions from the requirement to  
18 respond appropriately to sexual harassment under Title IX or  
19 from the prohibition on retaliation against individuals to  
20 invoke their rights under Title IX."

21 Now, Ms. Yao, was it your testimony that this is -- that  
22 this statement is accurate with respect to OCR policy -- that  
23 they would be skeptical of such an exemption?

24 A I don't think that's what I testified to.

25 Q Okay. Then could you just remind me of what your

1 testimony was about this paragraph when Ms.-- when your counsel  
2 went over it?

3 A My understanding was that she asked me whether schools  
4 had -- whether we had granted exemptions from the retaliation  
5 provision of Title IX. And I said, "Not that I was aware of,  
6 and that schools have not sought nor have they gotten  
7 assurances of religious exemptions based on their obligation to  
8 respond to sexual harassment." And I said that that -- "this  
9 passage is consistent with my understanding." I don't -- I'm  
10 not sure that there is an OCR policy of skepticism.

11 Q All right. But here it says, "The Department is skeptical  
12 that schools will be eligible." Is that consistent or  
13 inconsistent with your understanding?

14 A Yes. That's what it says.

15 Q Okay. So what about with respect to housing regulations?  
16 Would the Department be skeptical or not skeptical that an  
17 educational institution could assert a religious exemption with  
18 respect to OCR's housing regulation for transgender students?

19 A I'm sorry. I'm not sure how to answer your question about  
20 whether the Department would be skeptical about an exemption.

21 Q Well, here it says, "The Department is skeptical about  
22 asserting a religious exemption for harassment." Is that  
23 correct? That's what we were just reading; right?

24 A Yes.

25 Q So at least as for some of the OCR regulations, the

1 Department is going to be skeptical for the insertion of a  
2 religious exemption; is that correct?

3 A Yes.

4 Q And I believe that you testified that that is true at  
5 least with respect to harassment and retaliation; is that  
6 right?

7 A Yes.

8 Q Well, so I want to ask about other aspects of the Title IX  
9 regulations. Because under the Title IX regulations, there are  
10 regulations for harassment, regulations for retaliation, but  
11 there are also regulations about housing, athletics, access to  
12 courses and educational materials. Isn't that true that there  
13 are a variety of regulations, and harassment and retaliation  
14 are only two of them; is that correct?

15 A Yes.

16 Q And so the Department is skeptical as to retaliation and  
17 harassment. Is the Department also skeptical for housing  
18 discrimination?

19 A I can't speak to whether the Department is skeptical about  
20 exemptions from those regulations. But I do know that we have  
21 given assurances of exemptions from other provisions of  
22 Title IX.

23 Q And is it your understanding the Department of Education  
24 is allowed to question whether or not an educational  
25 institution's religious tenets excuse it from compliance with

1 various regulations of Title IX? Is the Department allowed to  
2 question the religious educational institution's exertions  
3 there?

4 A No, not at the outset. We take the religious -- we take  
5 the educational institution's representations as they come to  
6 us in the request.

7 Q But if I'm an educational institution, and let's say in  
8 response to getting a Title IX complaint from one of these  
9 plaintiffs I've disciplined that plaintiff for being LGBT and  
10 for filing that Title IX complaint. And it's my religious  
11 belief that as a religious tenet of our controlling  
12 organization, that biblical discipline requires that kind of  
13 retaliation. And so I'm going to assert a religious exemption  
14 from the retaliation.

15 Given what you just said about the Department's  
16 skepticism, how is the Department going to resolve that kind of  
17 assurance of exemption? Will it just accept it or will it be  
18 skeptical of it?

19 A I think you're asking me to respond to a hypothetical,  
20 which I can do my best to respond. If the complainant  
21 challenges the dismissal of the complaint or -- I'm trying to  
22 think. So you are saying that there's a complaint pending  
23 because the school disciplined the student for filing a Title  
24 IX complaint --

25 Q That's correct.



1 A -- and retaliated against that student?

2 Q That's correct, as a form of biblical discipline.

3 A If the student were to challenge the application of the  
4 religious tenet, then OCR may contact the controlling  
5 organization to seek clarification.

6 Q And if that controlling organization agrees that biblical  
7 discipline demands the retaliation, will OCR then grant the  
8 religious exemption?

9 MS. FEDERIGHI: Objection, calls for speculation.

10 THE COURT: Overruled. Answer the question.

11 THE WITNESS: If all the criteria are met for the  
12 religious exemption, and the controlling organization has  
13 confirmed the application of the religious tenet, or the  
14 application of the Title IX provision conflicts with the  
15 religious tenet, then, yes, I think that OCR would grant the  
16 assurance of the religious exemption.

17 BY MR. SOUTHWICK:

18 Q One other thing I wanted to ask you about, Ms. Yao, is in  
19 doing this analysis of whether the religious tenet conflicts  
20 with compliance of Title IX, does the Program Legal Group do  
21 any analysis in terms of weighing -- like weighing the burden  
22 on the religious tenet versus the burden on the harmed  
23 student -- or is there no weighing of, you know, significant  
24 burden versus minimal burden? Is there no weighing, or is  
25 there some kind of weighing that goes on?

1 A We do not consider the possible outcome.

2 Q So if a religious educational institution says, "We do not  
3 want students who exercise their right to same-sex marriage to  
4 be on our campus at all. We don't want them to be in a  
5 graduate nursing program. We don't want them to be in a  
6 graduate engineering program. And our position is that our  
7 religious beliefs require the expulsion of that married  
8 same-sex student. Even if they're at the very end of their  
9 graduate degree program and only have a few credits left, we  
10 are claiming that exemption," and no matter how disruptive that  
11 would be to that student, or how minimally burdensome it would  
12 be to that educational institution, the regulations require OCR  
13 to grant the assurance of exemption in that kind of a  
14 situation; don't they?

15 A Yes. But I would also say that the statute requires OCR  
16 to honor the religious exemption.

17 Q Ms. Yao, I'd like to direct your attention to Government's  
18 Exhibit No. 10. Exhibit No. 10 is the policy guidance for  
19 resolving religious exemption requests. This is the 1985  
20 Singleton Memorandum; is that correct?

21 A Yes.

22 Q And I'd like to look at page 3 of this document under  
23 "Tenets." Do you see that subheading "Tenets"?

24 A Yes.

25 Q It says "OCR cannot question what institution

1 representatives claim as their religious beliefs." Would you  
2 agree with that statement?

3 A Yes.

4 Q It goes on to say, "Only where one tenet clearly  
5 contradicts another could OCR question the institution policy  
6 based on those contradictory tenets." Would you agree with  
7 that statement?

8 A Yes.

9 Q It goes on, "Several institutions claim adherence to  
10 written references, such as the Bible, and quote sections as  
11 religious tenets or as support for religious tenets." It goes  
12 on to say, "I suggest that staff check these cited passages, if  
13 feasible and necessary, to determine that the written reference  
14 is cited or quoted correctly." Is that an OCR practice?

15 A Yes.

16 Q It goes on to the next paragraph, "Unfortunately, many  
17 institutions have not been so clear regarding the tenets of the  
18 religious organization as to quote sections of the Bible. For  
19 example, many have requested exemptions from the marital and  
20 parental status sections of the regulation. Several of these  
21 institutions state only that these sections prevent them from  
22 screening students and employees whose behavior is not in  
23 accordance with the, quote, 'Christian' or, quote, 'biblical  
24 morals' followed by the institution."

25 It goes on, "You should accept these very general tenets

1 for those sections of the regulation regarding marital and  
2 parental status of students and employees -- sections noted  
3 above -- since the prohibitions in these sections are so  
4 specific." Would you agree with that statement as OCR  
5 practice?

6 A I'm not sure that I've reviewed any responses to  
7 assurance -- to request for assurances for religious exemptions  
8 that fit within this category.

9 Q The final statement is, "For all other sections of the  
10 regulation, which are more complex, you should require that  
11 institutions be more specific than to simply claim Christian or  
12 biblical morals as tenets."

13 Is that OCR's current practice, to require institutions to  
14 be more specific than to simply claim Christian or biblical  
15 morals as tenets if they're trying to request exemption from  
16 OCR's regulations?

17 A Yes.

18 Q Ms. Yao, are you familiar with the religious exemption  
19 requests that came into the Department of Education shortly  
20 after the enactment of Title IX in 1974? These are historical  
21 documents. You were not involved in them. But these are the  
22 documents from the '70s that were eventually responded to in  
23 the '80s. And you already reviewed one of them, at least, with  
24 Counsel. And you've got some others included in your binder  
25 here.

1 Is it fair to say that a lot of those regulations were  
2 about requesting religious exemptions so that educational  
3 institutions could regulate women's bodies, their reproduction,  
4 and allow them to be punished for being pregnant outside of  
5 wedlock?

6 A Yes.

7 Q And OCR granted those exemption requests; correct? Or  
8 assurances -- excuse me.

9 A Yes.

10 Q Sorry, I didn't get your answer on that one.

11 A I said "yes."

12 Q No further questions. Thank you very much for your  
13 testimony, Ms. Yao.

14 THE COURT: For the Intervenor?

15 MR. PRINCE: Yes, Your Honor. Can you hear me?

16 BY MR. PRINCE:

17 Q Thank you for your testimony today. I have very few  
18 questions, and I will be very quick.

19 THE COURT REPORTER: Who is this?

20 BY MR. PRINCE:

21 Q One of the --

22 THE COURT: Wait.

23 THE COURTROOM DEPUTY: Excuse me, who's speaking,  
24 please?

25 MR. PRINCE: I apologize. This is Joshua Prince for

1 CCCU.

3 CROSS-EXAMINATION

4 BY MR. PRINCE:

5 Q So one of the questions that you were asked in your  
6 cross-examination was whether --

7 THE COURT: I don't see him.

8 THE COURTROOM DEPUTY: He's just on the phone.

9 BY MR. PRINCE:

10 Q -- a school that has a policy allowing retaliation just  
11 for submitting a complaint with OCR would be eligible for the  
12 religious exemption; do you remember that?

13 A Yes.

14 Q Are you aware of any school that has ever sought such an  
15 exemption?

16 A No, I'm not.

17 Q Are you aware of any school that believes that retaliation  
18 is itself a violation of its core tenets?

19 A No.

20 Q Are you aware of any school that has requested a religious  
21 exemption that would allow for sexual harassment on the basis  
22 of sexual orientation or gender identity?

23 A No.

24 Q With respect to 34 CFR 106.12(b), is it fair to say that a  
25 religious school could foreseeably (sic) waive its rights to a

1 religious exemption?

2 A Yes.

3 Q And just three more questions. Has the Department of  
4 Education ever told a religious organization, to your  
5 knowledge, to implement policies on human sexuality or gender  
6 identity?

7 A No.

8 Q Has the Department of Education, to your knowledge, ever  
9 told a religious college or university to harass any of its  
10 students on the basis of sex, however you define that term?

11 A No.

12 Q No further questions.

13 THE COURT: Additional questions from the other  
14 Intervenors?

15 MR. LIPPELMANN: Ms. Yao, my name is Mark Lippelmann.  
16 For the Religious School Intervenors, I have no further  
17 questions. Thank you for your testimony.

18 THE COURT: Redirect? Anything?

19 MS. FEDERIGHI: No, Your Honor. Nothing further from  
20 me.

21 THE COURT: Thank you.

22 MS. FEDERIGHI: From Defendants.

23 THE COURT: May this witness be excused?

24 MS. FEDERIGHI: Yes, Your Honor.

25 THE COURT: Thank you, Ms. Yao. Thank you very much.

1 You're excused.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: You're welcome.

4 We're going to take a brief break for the court reporter.  
5 That was not an easy session. So we'll take about 10 minutes  
6 and then we'll call -- I guess we'll have the next witness.  
7 And that's Mr. Wills; is that right? All right. I assume  
8 that's correct. No one's responding.

9 MR. SOUTHWICK: I believe that's correct, Your Honor.

10 THE COURT: All right. Thank you.

11 THE COURTROOM DEPUTY: Court's in recess.

12  
13 (A break was taken from 3:44 PM to 3:57 PM.)  
14

15 THE COURT: So I'm coming back on the record. This  
16 is Judge Aiken. And here's what I'm going to propose. We're  
17 not going to finish today. That's obvious, to me at least,  
18 given the length of time that last witness took. And we have  
19 two more witnesses to go. So I'm going to just -- we're going  
20 to finish at 5:00, which is 5:00 West Coast, which is 8:00 East  
21 Coast time. So we'll finish at 5:00 today. I'm not doing  
22 that -- running long for the court reporter. And I have staff  
23 who need to drive more than two hours back home. So we're not  
24 going to go past 5:00.

25 I'm going to propose and ask my courtroom deputy to move



1 my calendar for Monday morning. And we will pick back up and  
2 have until noon, because I can't eliminate the whole day. I  
3 will move some of my hearings around the first three days of  
4 the week so I can give you the morning. You need to plan  
5 accordingly now to manage these last couple of witnesses so  
6 that we finish during that period of time.

7 I'm going to tell you right now that we're going to have  
8 written arguments. I will give you the dates they'll be due  
9 and the responses -- when they'll be due -- and the page  
10 limits. And I'll give you that when we finish tonight so you  
11 can start planning. But just in terms of managing this, it's  
12 gone longer than I've anticipated. And so I think just in  
13 terms of putting some guardrails on for people, I'm going to  
14 give you that constraint at this particular point.

15 If we need more time, then I'm just going to have to  
16 figure out how to carve out another chunk of a day. And I'm  
17 not sure when I'll be able to do that. Because, as you may  
18 know, Thursday is a holiday. Friday the court is down because  
19 we won't have any technology. It's all being -- there's a big  
20 renovation going on our technology. So we're going dark that  
21 Friday. And so we have to pick it up the following week.

22 So that's just -- I'm transparent about what our schedule  
23 can and may be, but I can't do much more with my calendars on  
24 Monday afternoon, Tuesday, or Wednesday. They are -- they are  
25 back-to-back and stacked. So with that being said, call your

1 next.

2 MR. SOUTHWICK: Your Honor, this is Paul Southwick.  
3 I would just suggest -- Plaintiffs are willing to forgo closing  
4 in light of the fact that Your Honor is receiving briefing  
5 after the end of evidence. To the extent that that is helpful,  
6 Plaintiffs are fine with forgoing closing statements.

7 THE COURT: Well, your closing statements are going  
8 to be in writing.

9 MR. SOUTHWICK: Okay. So there would be none anyway.  
10 All right. Thank you.

11 THE COURT: There were never going to be any. I cut  
12 that off. We're going to finish with the testimony, and then  
13 you'll do your closing arguments in writing with page --

14 MR. SOUTHWICK: Okay. Thank you.

15 THE COURT: -- with page limits and deadlines. All  
16 right? And I see it looks like the Government reconfigured.  
17 So I think maybe we'll have another shot at actually hearing  
18 people, which will be really great. All right. So --

19 MS. SNYDER: I hope so, Your Honor.

20 THE COURT: This looks like it has potential to be  
21 much better. Okay. So call your next.

22 MS. FEDERIGHI: 2.0 -- or maybe 4.0 at this point.

23 Your Honor, we call Randolph Wills.

24 THE COURT: All right. And where is Mr. Wills?

25 MS. SNYDER: Right here.

1 THE COURT: That's what I thought. My concern is --  
2 I'm having -- that's who I assumed it is seated next to you.  
3 But I'm having trouble hearing you. You're soft still. You're  
4 visually easier to see.

5 But, Mr. Wills, I'm going to have to hear you speak to see  
6 how this will work. So why don't you --

7 MR. WILLS: Good afternoon, Your Honor. Can you hear  
8 me loud enough?

9 THE COURT: It's iffy. Louder would be better.

10 MR. WILLS: Afternoon, Your Honor.

11 THE COURT: All right. Raise your right hand.

12  
13 R-A-N-D-O-L-P-H W-I-L-L-S,  
14 called as a witness, having been first duly sworn, testified as  
15 follows:  
16

17 THE COURT: And what I would suggest is we move the  
18 camera -- twist the camera over -- because I'm kind of blocked  
19 with my squares to see. And it helps me to see someone's  
20 mouth. And if you could turn it a little further down. There,  
21 it's much better. That helps.

22 THE COURT REPORTER: Is that Ms. Snyder?

23 THE COURTROOM DEPUTY: Judge, can you ask -- is that  
24 Ms. Snyder with him, or who that questioning him?

25 THE COURT: The court reporter would like you to

1 identify yourself for the record if you're going to do the  
2 direct exam, Counsel.

3 MS. SNYDER: Me?

4 THE COURT: Yes.

5 MS. SNYDER: Hi, this is Hilarie Snyder.

6 THE COURT: Okay. All right. So are we ready?

7 MS. SNYDER: I think so, Your Honor.

8 THE COURT: All right. Go ahead.

9 MS. SNYDER: We'll talk loudly.

10 THE COURT: Okay.

11 MS. SNYDER: Would you like to swear him in, Your  
12 Honor, or --

13 THE COURT: I just did.

14 MS. SNYDER: Oh, I'm sorry. It's been a long day.  
15 I'm so sorry, Your Honor.

16 THE COURT: No, no, no. That's all right.

17  
18 DIRECT EXAMINATION

19 BY MS. SNYDER:

20 Q Mr. Wills, could you state who your employer is?

21 A Yes. My employer is the United States Department of  
22 Education Office for Civil Rights.

23 Q And how long have you been employed with the Department of  
24 Education.

25 A I've been employed with the Department of Education since

1 July 2003.

2 Q Prior to your work with the Department of Education, where  
3 did you work?

4 A I worked for the New York City Commission on Human Rights.

5 Q And how long were you employed by the New York Commission  
6 of Civil Rights?

7 A Slightly over 13 years.

8 Q What job titles have you held during your tenure with the  
9 U.S. Department of Education?

10 A I started at the U.S. Department of Education Office for  
11 Civil Rights as a Regional Director of our New York Regional  
12 Office. In 2008, I became an enforcement director for the  
13 Office for Civil Rights overseeing the work of several of our  
14 regional offices. And then in September 2018, I became a  
15 Deputy Assistant Secretary for enforcement for the Office of  
16 Civil Rights.

17 Q You mentioned "the Office for Civil Rights." What's the  
18 mission of the Office for Civil Rights?

19 A The mission of the Office for Civil Rights is to ensure  
20 equal access to education and to promote educational  
21 opportunity through providing vigorous enforcement of civil  
22 rights.

23 Q Do you ever refer to the Office for Civil Rights by an  
24 acronym?

25 A Yes. We very often refer to the Office of Civil Rights as

1 "OCR."

2 Q And are there components or branches within the Office for  
3 Civil Rights?

4 A Yes, there are. There are four components to the Office  
5 for Civil Rights. There is the enforcement component, which is  
6 the largest component of OCR. Its primary responsibility is  
7 the evaluation, investigation, and resolution of individual  
8 complaints of discrimination that are filed with OCR. It is  
9 also responsible for engaging in proactive enforcement  
10 activities, which is to say conducting compliance reviews and  
11 directed investigations.

12 It also has an additional responsibility of providing  
13 technical assistance to students, to teachers, to parents, to  
14 recipient educational institutions, to advocacy groups  
15 concerning rights and obligations under the civil rights laws  
16 that we enforce.

17 A second component of OCR is our Program Legal Group.  
18 Their primary responsibilities are the development and  
19 implementation of policy and interpretation. They also have a  
20 very significant responsibility of data collection. They  
21 implement, every several years, our Civil Rights Data  
22 Collection.

23 A third component of OCR is what we call our Open Center.  
24 And this is a center that assists us with developing technical  
25 assistance activities and conducting outreach activities to, as

1 I said before, the general public, recipient educational  
2 institutions.

3 And then, finally, we have a component known as the  
4 Resource Management Group, which is responsible for handling  
5 personnel matters, internal budgeting, certainly internal  
6 management, and other related activities within OCR.

7 Q And so of the four components, which one do you work in?

8 A I work in the Enforcement Component.

9 Q And has that been the case for the entire time you've  
10 worked at the Department of Education?

11 A Yes, it has.

12 Q If you could please, just identify the primary  
13 responsibilities of OCR's Enforcement Component.

14 A The primary responsibility of the Enforcement Component  
15 consists of, as I mentioned before, the evaluation,  
16 investigation, and resolution of the thousands of individual  
17 complaints alleging discriminatory practices by educational  
18 institutions.

19 They also have the responsibility for investigating  
20 conducting compliance reviews and directed investigations.  
21 And, as I mentioned earlier, the enforcement component also  
22 provides very important technical assistance and outreach to  
23 the various communities that we serve nationwide.

24 Q You mentioned that one of the responsibilities is the  
25 evaluation, investigation, and resolution of administrative

1 complaints of discrimination. Are there particular types of  
2 discrimination that OCR considers?

3 A Yes, there are. OCR considers allegations of  
4 discrimination based on race, color, national origin, sex,  
5 disability, age. And we also have statutory authority to  
6 investigate complaints, although we have very few of them,  
7 alleging violations of the Boy Scouts of America Equal Access  
8 Act.

9 Q And you mentioned that you are "enforcing laws." What  
10 laws is OCR enforcing?

11 A OCR enforces six laws. We enforce Title VI of the Civil  
12 Rights Act of 1964; we enforce Title IX of the Education  
13 Amendments of 1972; Section 504 of the Rehabilitation Act of  
14 1973; the Age Discrimination Act of 1975. Title II of the  
15 Americans with Disabilities Act of 1990; and, again, the Boy  
16 Scouts of America Equal Access Act of 2001.

17 Q You mentioned that you're the Deputy Assistant Secretary  
18 for Enforcement for the Office for Civil Rights. How long have  
19 you held that position?

20 A I've held that position since September 2018.

21 Q And does OCR have -- excuse me. What are your primary job  
22 responsibilities?

23 A My primary job responsibilities are to oversee the  
24 enforcement activities -- both individual case enforcement and  
25 proactive enforcement activities -- of all 12 of OCR's Regional



1 Enforcement Offices. I also have general management oversight  
2 for those offices. I'm responsible for the hiring of  
3 personnel. I'm responsible for working with our budget in its  
4 largest part of OCR. And I have a significant responsibility  
5 in advising the Assistant Secretary of OCR on enforcement  
6 activities, enforcement priorities, and directions that we take  
7 with regard -- in particular to our proactive enforcement  
8 activities.

9 Q You mentioned "12 regional offices." Where are they  
10 located?

11 A The regional offices are located in Boston; New York City;  
12 Philadelphia; Washington, D.C.; Atlanta; Cleveland; Chicago;  
13 Kansas City; Dallas; Denver; Seattle; and San Francisco.

14 Q And could you briefly just describe for the Judge how the  
15 offices are structured? What's the chain of command?

16 A Surely. Each office is headed by a regional director.  
17 Each office has what we call a senior triad -- a senior  
18 management triad -- led by the regional director. The other  
19 two members of the senior triad in each regional office are the  
20 chief attorney -- the chief regional attorney -- and the  
21 program manager for the office.

22 Below that we have -- each office has a team structure.  
23 There are a number of teams in each office. It varies  
24 according to the size of the office. But each office has  
25 teams. The teams are composed of mainly attorneys but some

1 non-attorneys as well. They are the investigative staff. Each  
2 team, which is composed of five to eight investigative staff  
3 members, is led by a supervisory team leader.

4 Q And who do the regional directors report to?

5 A The regional directors report to the enforcement  
6 directors. OCR currently has four enforcement directors, and  
7 they are attached to OCR's headquarters office.

8 Q Okay. So who do the enforcement directors report to?

9 A The enforcement directors report to me.

10 Q Okay. And so, in total, how many people do you oversee?

11 A In total, I oversee slightly over 400 staff in the  
12 enforcement component of OCR.

13 Q And who do you report to? Who's your boss?

14 A I report directly to the Assistant Secretary.

15 Q And is the Assistant Secretary for OCR a  
16 Presidentially-appointed and Senate-confirmed position?

17 A Yes, she is. Yes, it is. That is a  
18 Presidentially-appointed and Senate-confirmed position.

19 Q And who is the Assistant Secretary now?

20 A Catherine E. Lhamon is currently the Assistant Secretary.

21 Q And when was she confirmed?

22 A She was confirmed just about two weeks ago.

23 Q When you described OCR Enforcement's responsibilities, you  
24 mentioned that one of them was to, quote, "evaluate,  
25 investigate, and resolve administrative claims involving, among

1 other things, Title IX." Did I get that correct?

2 A That is correct.

3 Q Okay. Do you have an understanding of what Title IX is?

4 A Yes. Title IX is the federal statute that generally  
5 prohibits discrimination on the basis of sex in education,  
6 program, and activities.

7 Q Okay. And does OCR follow a standard process in  
8 evaluating, investigating, and resolving Title IX complaints?

9 A Yes, it does.

10 Q And is that process written down somewhere?

11 A It is. That process is articulated and set forth in OCR's  
12 Case Processing Manual.

13 Q Is that manual publicly available?

14 A Yes, it is.

15 Q Where can someone find it?

16 A The manual is available online in our publicly facing  
17 website. And it's -- yes -- the online -- it's also available  
18 in written form. If we're contacted, we will certainly send  
19 out a hard copy. But, generally speaking, most people access  
20 it online.

21 Q Okay. Could you please take a look -- I know you have a  
22 binder in front of you.

23 MS. SNYDER: And if our paralegal could call up  
24 Exhibit 1, please?

25

1 BY MS. SNYDER:

2 Q Could you identify what's been marked as Government  
3 Exhibit 1?

4 A Yes. This is the Case Processing Manual for the U.S.  
5 Department of Education Office for Civil Rights. It became  
6 effective August 26th, 2020.

7 Q And is this the manual that you were just describing that  
8 includes the process for evaluating, investigating, and  
9 resolving administrative complaints involving Title IX?

10 A Yes, it is.

11 MS. SNYDER: Your Honor, I understand nobody objects  
12 and you've agreed to admit, so we just want to make official  
13 that we'd like this admitted into the record of the case --  
14 Government Exhibit 1.

15 THE COURT: Admitted.

16 MS. SNYDER: Thank you.

17 BY MS. SNYDER:

18 Q Now, who can file an administrative complaint with OCR  
19 alleging a violation of Title IX?

20 A Any person who believes that they have been discriminated  
21 against may file on their own behalf, on behalf of another  
22 individual, or on behalf of another group of individuals.

23 Q Okay.

24 MS. SNYDER: And to our paralegal -- Beth, please --  
25 you can take that down for now. Thank you.

1           Sorry, Your Honor. We're in different rooms.

2           THE COURT: No problem.

3 BY MS. SNYDER:

4 Q       So what is OCR's first step in processing such a complaint  
5 upon receipt?

6 A       The first step that OCR takes is to determine whether the  
7 complaint that we have received is something that we can  
8 subject to further processing.

9 Q       Do you have a name for this step?

10 A       Yes. This step is known as evaluation. And the  
11 evaluation steps are set forth in the Case Processing Manual in  
12 Article I.

13 Q       And could you just briefly describe for the Court what OCR  
14 considers in the evaluation step?

15 A       Certainly. In the evaluation step, we consider a number  
16 of factors. First, we'd look to determine whether we have  
17 subject-matter jurisdiction, whether we have personal  
18 jurisdiction. We consider whether the complaint has been filed  
19 timely. And if we -- if it appears it has not been timely,  
20 whether a waiver of the timeliness requirement has been  
21 requested.

22           We also consider whether the complaint is of a sort that  
23 would require a signed consent form from the complainant or  
24 from the complainant on behalf of, for example, a minor child.  
25 We would need that consent form in many of our cases in order

1 to open the case for investigation and provide a certain  
2 amount -- a minimal amount -- but a necessary amount of  
3 information -- personal information -- to the recipient  
4 educational institution so that they could properly respond to  
5 the complaint.

6 We also consider a number of circumstances that would  
7 require dismissal of the complaint if they were met. And  
8 those -- there are 19 of them in Section 108 of the Case  
9 Processing Manual. They include, of course, personal  
10 jurisdiction, subject-matter jurisdiction, and timeliness  
11 issues. But they also include other very important issues such  
12 as does OCR have enough other sufficient facts and details  
13 alleged in the complaint for OCR to infer the discrimination  
14 has occurred or may be occurring? There are 18 other bases for  
15 dismissal, but we consider all of those, as well, in the  
16 evaluation phase of looking at a complaint.

17 Q Okay. Is there a time frame within which OCR must  
18 complete the evaluation stage?

19 A There is not. There is no time frame, internal or  
20 external, that we have that requires the evaluation to be  
21 completed within any certain time frame. I will add, however,  
22 that OCR, as with other government agencies, is subject to the  
23 Government Performance and Results Act of 1993. And that was  
24 an act that required government agencies to develop performance  
25 measures.

1           OCR has performance measures related to the resolution of  
2       complaints. And the most significant performance measure for  
3       OCR and for enforcement staff is that we have a goal of  
4       completing 80 percent of the complaints that are filed with us  
5       within 180 days of their receipt by OCR.

6       Q     So how many complaints, when averaged per year, does OCR  
7       receive across all of the statutes it enforces?

8       A     We receive -- and it varies from year to year -- we  
9       receive between 9,000, or nearly 9,000, to 11,000 complaints  
10      per year. This past fiscal year that we just completed, we  
11      received just over 8,900 complaints, which is low for OCR. But  
12      it was also a reflection of COVID and the closure of many  
13      schools.

14      Q     And so if I understand correctly, OCR's goal is to  
15      complete 80 percent of the approximately 8,000 to 10,000  
16      complaints within 180 days; is that correct?

17      A     That's correct.

18      Q     During the evaluation stage, does OCR ever speak with the  
19      complainant, that is, the person that filed the administrative  
20      complaint?

21      A     Yes. There are times when OCR will reach out and speak to  
22      the complainant.

23      Q     And in what circumstances might that occur?

24      A     It occurs actually most often when we receive complaints  
25      that are unclear. The vast majority of the complaints that OCR

1 receives are not submitted by attorneys. They're submitted by  
2 parents, by individuals who don't have the benefit of counsel.  
3 So we very often have to reach out and have conversations with  
4 the complainants to clarify exactly what their allegations are  
5 to determine whether we have enough information -- be it who,  
6 what, when, where, how, and why -- that is necessary for us to  
7 at least be able to infer that discrimination occurred.

8 We very often have to clarify issues around when the  
9 complaint was filed and timeliness issues. So we will have  
10 occasion sometimes to speak with complainants under those  
11 circumstances.

12 Q Okay. Does -- is OCR required to speak with the  
13 complainant during the evaluation stage?

14 A No. There's no requirement that investigative staff must  
15 speak with complainants.

16 Q So am I correct in understanding then that OCR would speak  
17 with a complainant essentially if it needed more information?

18 A Yes. That's -- generally speaking, that is the reason why  
19 we reach out to a complainant -- more information and  
20 clarification.

21 Q Does OCR typically speak with the recipient school during  
22 the evaluation stage?

23 A OCR does not typically speak with the recipient  
24 educational institution or school during the evaluation stage.

25 Q And what do you mean by the term "recipient"? What does



1 that mean?

2 A A recipient is an educational institution -- any  
3 educational institution that receives federal financial  
4 assistance from the U.S. Department of Education.

5 Q You mentioned, I believe, that OCR considers about 19 or  
6 so issues, or potentially considers 19 or so issues, during the  
7 evaluation stage to determine whether or not it should dismiss  
8 the complaint. Does OCR consider the 19 or so issues in any  
9 particular order?

10 A No. It doesn't consider them in any particular order. As  
11 I said initially, and the way the CPM -- the Case Processing  
12 Manual -- is structured, it's laid out as though it's a  
13 sequence. It is not actually a schedule. We sometimes  
14 consider a variety of issues simultaneously. Or there will be  
15 an issue that leaps out immediately from the face of the  
16 complaint, such as timeliness, that we would consider, even  
17 though timeliness is -- in the Case Processing Manual --  
18 follows our discussion on subject matter and personal  
19 jurisdiction. There is no set order that we use in the  
20 evaluation stage.

21 Q Okay. You mentioned "timeliness." Can you describe kind  
22 of what OCR considers when deciding whether a complaint is  
23 timely?

24 A Yes. Our regulations require that a complaint, in order  
25 to be timely, must be filed within 180 days of the last alleged

1 act of discrimination.

2 Q And under what circumstances might OCR consider a  
3 complaint that is outside the 180-day window?

4 A OCR's procedures in the Case Processing Manual in  
5 Section 107 provide for waivers of the timeliness requirement.  
6 That section sets forth several circumstances under which  
7 waivers might be granted. We will reach -- if a complaint is  
8 untimely, we will generally speak with the complainant and  
9 request -- ask them if they want to request the waiver and, if  
10 they do, ask them what the basis for the request might be.

11 As I noted in Section 107, there are a number of examples.  
12 A couple of them are we might grant a waiver if the complainant  
13 could not reasonably be expected to know that the act that they  
14 were subjected to was discriminatory. We also have -- we would  
15 consider a waiver under circumstances where the complainant was  
16 suffering from an incapacitating illness or other  
17 incapacitating circumstances. There are a number of bases for  
18 which OCR would consider the granting of a waiver. And in  
19 granting a waiver, of course, that would permit the complaint  
20 to go forward notwithstanding its facial untimeliness.

21 Q If OCR determines in this evaluation stage that the  
22 administrative complaint fails to meet one of the 19 or so  
23 threshold issues that OCR considers in the evaluation stage,  
24 what would OCR do next?

25 A If that determination has been made, OCR would dismiss the

1 complaint. It would be required to dismiss the complaint  
2 actually.

3 Q Okay. And does OCR notify the person that filed the  
4 complaint about the dismissal?

5 A Yes. OCR, upon determining its dismissal, if required,  
6 would issue a letter to the complainant indicating, first of  
7 all, the nature of the complaint that was filed, OCR's analysis  
8 in the evaluation, and the basis that OCR has for dismissing  
9 the complaint.

10 Q Okay. Does that letter include any form language?

11 A Yes, it does. Typically, our dismissal letters include  
12 language informing the complainant that they may have a right  
13 to file a private right of action in court.

14 Q Okay. And, in contrast, if OCR determines that a  
15 particular administrative complaint has met all of the  
16 evaluation threshold issues -- the 19 or so -- what happens  
17 next? What does OCR do?

18 A At that point, OCR would issue a letter to the educational  
19 institution -- so the recipient educational institution --  
20 notifying the institution that it was opening the complaint --  
21 or several allegations in the complaint, or all of the  
22 allegations in the complaint -- it varies from case to case --  
23 notifying the recipient institution that it was opening the  
24 complaint and its allegations for investigation. OCR will also  
25 send a letter to the complainant notifying the complainant that

1 it is opening the complaint or the allegations for  
2 investigation as well.

3 Q Okay. Could you please look at what's been marked as  
4 Government Exhibit 2?

5 MS. SNYDER: And, Beth -- thank you.

6 BY MS. SNYDER:

7 Q Could you identify Government Exhibit 2, please?

8 A Yes. Government Exhibit 2 is a redacted letter of  
9 notification issued in a Title IX action to a recipient  
10 educational institution.

11 Q And is this a typical sample of the -- strike that.

12 MS. SNYDER: Your Honor, I ask -- I know nobody has  
13 objected -- so I ask that Government Exhibit 2 just be made  
14 part of the record and admitted.

15 THE COURT: All your exhibits -- as you put them up,  
16 they're deemed admitted.

17 MS. SNYDER: Oh, thank you.

18 THE COURT: No one has objected to your exhibits, and  
19 I have that on the record. So they're just deemed admitted.

20 MS. SNYDER: Okay.

21 BY MS. SNYDER:

22 Q Okay. After OCR sends out a notification letter like  
23 Exhibit 2, what's the next step in the process?

24 A The next step in the process is to -- obviously we  
25 announce the opening of the investigation -- is to initiate the

1 investigation. And that generally -- generally the first step  
2 there is to issue a data request -- either a data request  
3 letter or a data request attached to the letter notification to  
4 the recipient where we are -- OCR is asking for documents that  
5 it believes at that early stage may be relevant to the  
6 investigation and to the work that OCR has to do. Or it may  
7 indicate that, at some point, we're going to reach out to the  
8 recipient and set up interviews with certain personnel. But  
9 it's an initial request for information, documents. We'll  
10 certainly have a request for a narrative response from the  
11 recipient as well.

12 Q Okay. So are these steps that you're describing outlined  
13 in the manual at Exhibit 1?

14 A Yes, they are. Yes, they are.

15 Q And you said OCR would basically ask for documents and  
16 information; is that correct?

17 A Yes.

18 Q Does it ever interview any witnesses?

19 A It does. In cases where it is deemed appropriate -- and  
20 that is in many cases -- OCR will interview witnesses, both  
21 recipient witnesses and complainant witnesses.

22 Q Okay. And what's OCR's purpose in interviewing witnesses  
23 and reviewing documents?

24 A Well, the whole purpose of the investigation, actually, is  
25 to make a determination with regard to whether a recipient

1 educational institution is complying or not complying with  
2 whatever the applicable statute is or statute for that  
3 particular complaint.

4 Q Okay. Is there a timeline within which OCR must complete  
5 the investigation stage?

6 A I mentioned the timeline earlier. It is a goal. It is  
7 our Government Performance and Results Act goal -- the hope --  
8 the expectation is. And it is a performance measure for all  
9 investigative staff that 80 percent of the complaints that are  
10 filed with OCR, and assigned to our investigators, are  
11 completed within 180 days of the date of filing.

12 Q Other than the goal that you just described that involves  
13 the actual completion of the administrative complaints, is  
14 there a goal or a timeline or time requirement that OCR has to  
15 complete this next investigation stage, in particular?

16 A Other than that broadly stated goal, no, there is no  
17 official OCR-mandated timeline for a completion of the  
18 investigation.

19 Q And what is the next step after OCR talks with witnesses  
20 and reviews documents? What's the next step in the  
21 investigation?

22 A The next step in the investigation is for OCR -- once it's  
23 completed -- well, is to make -- to make a determination.

24 Q Okay. And so what might OCR's options be to sort of bring  
25 to resolution an administrative complaint that it has been

1 investigating?

2 A There are a number of options available to OCR. One  
3 option immediately available -- although not used frequently --  
4 one option is a dismissal. We may learn information during the  
5 course of an investigation that would require dismissal of the  
6 complaint, even though we had initiated the investigation. And  
7 we do most of our looking at dismissal circumstances at the  
8 evaluation stage. But it's still available, and we have used  
9 that during the course of an investigation.

10 Other options include -- prior to the conclusion of the  
11 investigation, a recipient -- recipient educational  
12 institutions often reach out to us and ask to resolve the  
13 allegations in the complaint. And if OCR's investigation thus  
14 far has raised concerns sufficient for us to deem it prudent to  
15 enter into a resolution agreement with the recipient, we will  
16 do so before conclusion of the investigation.

17 We will ask the recipient to enter into a resolution  
18 agreement -- sign a resolution agreement -- that contains  
19 provisions that address OCR's thus far noted concerns in the  
20 investigation. But, again, that's prior to the conclusion of  
21 the investigation.

22 Once the investigation is concluded, OCR may determine  
23 that there is insufficient evidence to support a conclusion  
24 that the recipient institution has not complied with the  
25 applicable statute, in which case OCR will issue letters to the

1 recipient and the complainant stating, again, what the  
2 allegations of the complaint were, what OCR's investigation  
3 consisted of, the findings of fact that OCR made, and the  
4 conclusion that there is insufficient evidence to conclude that  
5 there has been noncompliance with the law.

6 At the end of -- at the conclusion of an investigation,  
7 OCR may also find that the recipient has failed to comply with  
8 the law or certain regulations that are at issue in a  
9 particular case. If that is the case, OCR will draft a  
10 resolution agreement that OCR has determined, if fully  
11 implemented, will remedy the noncompliance that recipients  
12 engaged in, and ask the recipient to sign that agreement. We  
13 will negotiate with recipients during that phase.

14 Once the recipient has signed a resolution agreement that  
15 satisfies OCR's areas of noncompliance, OCR will issue what's  
16 called a "letter of findings" to the recipient educational  
17 institution and to the complainant stating, again, what the  
18 allegations of the complaint were, what legal standards were at  
19 issue, OCR's findings and facts, the conclusions that OCR has  
20 reached, and the provisions of the resolution agreement that  
21 will address those particular areas of noncompliance.

22 Q Okay. So to make sure I understood, there's like broadly  
23 speaking then, four potential ways that OCR can resolve -- can  
24 conclude an investigation; is that correct?

25 A And those are the four major ways. I will add one



1 further. And that is the complainant and the recipient  
2 institution are, of course, free to resolve the case on their  
3 own. There can be a -- you know -- a separate settlement.  
4 Occasionally OCR will help them mediate at settlement. But  
5 that's always an option for the parties that they have, which  
6 could be -- it's not used frequently. There are very few  
7 private settlements. But --

8 Q Okay. So the four kind of more common options -- you said  
9 the first one was dismissal. And am I correct it's dismissal  
10 based on sort of one of the 19 or so --

11 A Correct.

12 Q -- one of the 19 or so considerations that OCR reviews in  
13 conjunction with in the evaluation stage; is that correct?

14 A That is correct. But I do want to point out that even in  
15 that Section 108 -- that we saw 19 of those circumstances --  
16 indicates that these are considered in dismissal, these are  
17 considered in evaluation, but they may also be considered  
18 during the course of the investigation.

19 Q Okay.

20 A It's set forth that way in the Case Processing Manual.

21 Q And so in that case where there's a dismissal, is the  
22 complainant notified of that dismissal?

23 A Oh, yes. Yes.

24 Q And what is generally the substance of the notification?

25 A The notification would look very similar to a notification

1 we would give to a complainant if we dismiss the case during  
2 the evaluation. We recite that, as they already know, the case  
3 is open for investigation. We have learned of circumstances  
4 that require us to dismiss the case. We would let them know  
5 what those circumstances are. We would articulate the basis  
6 for the dismissal and indicate that the case was now closed  
7 because we dismissed it.

8 Q And is there any form language in those letters,  
9 typically?

10 A Same form language -- we would notify both -- in this  
11 case, we would notify both the institution and the complainant.  
12 The form language that would be included there would be, among  
13 other things, that complainant has a right to institute a  
14 private cause of action in court.

15 Q Okay. Another of your common options that potentially  
16 resolve -- or to conclude a -- the investigation stage -- you  
17 mentioned both -- that potentially the religious -- or, excuse  
18 me -- both the school and -- could enter into a resolution  
19 agreement if it requested while the investigation was  
20 proceeding. Alternatively, the school could enter into a  
21 resolution agreement in the event that OCR determined that  
22 there was in fact a violation of the law. Did I state that  
23 correctly?

24 A That is correct. Those are two resolution options. The  
25 first -- the resolution option prior to the conclusion of

1 investigation -- if recipient requests to enter into an  
2 agreement, and OCR deems that that is appropriate -- that is  
3 the most common type of resolution that we have in OCR.

4 Q Okay. So whether the resolution agreement is as --  
5 happened during the investigation at the request of the  
6 recipient school or, alternatively, at the end of the  
7 investigation after OCR determines that there was in fact a  
8 violation -- in both instances, who are the parties to the  
9 resolution agreement?

10 A The only signatory to a resolution agreement in either  
11 circumstance is the educational institution -- is the recipient  
12 educational institution.

13 Q Okay. And is the complainant a party to the resolution  
14 agreement?

15 A No, not at all.

16 Q What about in the circumstances when OCR, at the end of an  
17 investigation, determines that there's insufficient evidence  
18 for it to conclude that a violation of a statute occurred?  
19 What is OCR's process in that circumstance?

20 A As I indicated earlier, in that circumstance, we would  
21 issue an -- we call it "insufficient evidence determination  
22 letter" -- to both the educational institution and to the  
23 complainant stating, first of all, what we looked at, how the  
24 investigation proceeded, the laws and regulations that were at  
25 issue, the findings of fact that OCR made, and ultimately its

1 conclusion that there was insufficient evidence to support a  
2 conclusion of noncompliance.

3 Q And is there any form language in that document?

4 A There is. Among other things, we will include a statement  
5 that the complainant has a right to institute a private action  
6 in court. And I would also add that we also offer, under those  
7 circumstances, the complainant a right to appeal the  
8 determination.

9 Q And so we've talked very generally about the evaluation,  
10 investigation, and resolution of the administrative complaints.  
11 First, is that all generally -- that process -- generally  
12 described in the Case Processing Manual at Exhibit 1?

13 A Yes, it is.

14 Q Okay. Now, in the evaluation, investigation, and  
15 resolution of administrative complaints alleging violations of  
16 Title IX, who is actually authorized within OCR to decide  
17 whether a complaint should be dismissed, investigated, or in  
18 some way resolved?

19 A With regard to all statutory bases -- not just Title IX --  
20 all proposals to dismiss or to open for investigation must be  
21 approved at a supervisory level.

22 Q So when a complaint comes in, who is it assigned to?

23 A It will be assigned to an investigative staff member --  
24 generally a staff attorney -- and that attorney will be  
25 responsible for guiding that complaint through whatever process

1 it needs to go through, depending on the nature of the  
2 complaint. But that is the primary responsibility of an  
3 investigative attorney.

4 Q So you earlier described sort of the chain of command, so  
5 to speak, within OCR. When you say that a supervisory attorney  
6 needs to actually authorize the dismissal or investigation or  
7 resolution of a complaint, is there a particular supervisory  
8 attorney in all instances that is responsible for that?

9 A No, not in all instances. It may vary. There are certain  
10 circumstances under which a team leader can authorize the  
11 issuance of a letter dismissing a case, for example. There are  
12 other circumstances where that needs to be dealt with at the  
13 Chief Attorney or Regional Director level. And there are  
14 further circumstances where that needs to be reviewed at the  
15 headquarters level -- at a much higher level.

16 Q Okay. Are you aware of the religious exemption to  
17 Title IX?

18 A I am.

19 Q And just could you please explain to the Judge what your  
20 general understanding of the religious exemption is?

21 A Surely. Religious exemption in the statute --  
22 Section 3 -- basically it exempts certain institutions that are  
23 controlled by religious organizations from certain  
24 (indiscernible) provisions in Title IX. Those provisions are  
25 contrary to the religious tenet of the organization.

1 Q Do you know if OCR issues letters to recipient schools  
2 regarding the religious exemption within Title IX?

3 A Yes, we do.

4 Q And which component considers those letters within OCR?

5 A Letters requesting assurances of exemption are processed  
6 by our Program Legal Group. And, ultimately, the decision is  
7 the Assistant Secretary's.

8 Q Okay. And just to be clear, you do not work in the  
9 Program Legal Group?

10 A I do not. And Enforcement has no hand, no part, in the  
11 consideration of those requests for assurance.

12 Q Okay. Now, you did say you worked in Enforcement. So  
13 does OCR Enforcement component ever consider the assurance  
14 letters in conjunction with its work in evaluating,  
15 investigating, and resolving Title IX complaints?

16 A Yes, we do.

17 Q At what stage might OCR Enforcement consider those  
18 assurance letters?

19 A OCR might consider them at any stage of our process.  
20 Generally, they're -- probably more often than not --  
21 considered at the evaluation stage. But they may be considered  
22 once we've opened a particular complaint for investigation.  
23 And I would say -- and I have never seen it, but it's certainly  
24 possible -- that very late in the stages -- where we're  
25 actually at a resolution stage or negotiation stage -- if we

1 learn that there is an exemption that would cover the  
2 particular allegations of the complaint, it certainly could be  
3 considered there too. But it is mainly considered in  
4 evaluation, but we also -- and we have examples -- where it has  
5 come up in the investigation phase, and we moved accordingly.

6 Q Okay. Generally speaking, what circumstance would OCR  
7 consider -- OCR Enforcement -- consider an assurance letter  
8 during that first evaluation stage?

9 A Generally speaking, in the evaluation stage, we would  
10 consider -- again, we haven't communicated with the recipient  
11 institution, generally speaking, in the evaluation stage. But  
12 if it happens, for example, that we receive a complaint -- or  
13 an investigative staff member receives a complaint against a  
14 religious institution -- and that staff member may know, from  
15 prior complaints that he or she has dealt with, that that  
16 particular institution may have -- may have an assurance of  
17 exemption -- maybe not sure of that, but might have a sense  
18 they may have an assurance of exemption -- at that point, the  
19 staff attorney would reach out to someone on our Title IX team  
20 in the Program Legal Group and find out if indeed there has  
21 been issued an assurance of exemption. And, if so, that would  
22 be shared with the investigative staff attorney who would then  
23 evaluate the extent of the exemption and determine whether, in  
24 that staff attorney's opinion, it covers the allegations of the  
25 complaint such that OCR would not have subject-matter

1 jurisdiction to go forward.

2 Q Okay. You said "covered by the allegations of the  
3 complaint." What does that mean?

4 A No. If the exemption itself is -- if the allegations of  
5 the complaint fall under whatever the exemption is about --  
6 whatever that might be -- the investigator staff attorney, at  
7 that point, might make a recommendation that we don't have  
8 subject-matter jurisdiction over this particular complaint,  
9 because the exemption basically -- basically without  
10 jurisdiction. Because the exemption is an area of the  
11 regulation that is specifically at issue in the allegations of  
12 the complaint.

13 Q Okay. So what happens if the assurance letter isn't  
14 covered by the allegations of the complaint?

15 A Under those circumstances, assuming that other  
16 considerations have been met -- timeliness -- we have enough  
17 detail to go forward -- we will simply -- we would open the  
18 complaint for an investigation. We would move it into  
19 investigation.

20 Q Okay. If you could please go to the letter at Exhibit 2?

21 MS. SNYDER: And, Beth, if you could call that up,  
22 please.

23 BY MS. SNYDER:

24 Q And just to be clear, Mr. Wills, when does -- strike that.  
25 Just to be clear, does this letter -- or something



1 substantially similar that's in Exhibit 2 -- does that get sent  
2 when an investigation is open to all Title IX cases or just  
3 certain Title IX cases?

4 A We'll issue this letter, or a letter substantially similar  
5 to it, in all Title IX cases -- all cases where we received a  
6 complaint that there's been a violation of Title IX.

7 Q Okay. And could you please read paragraph 2 on page 1 --

8 A Certainly.

9 Q -- for the Court?

10 A Certainly. "OCR enforces Title IX of the Education  
11 Amendments of 1972, Title IX 20 USC § 1681 through 1688, and  
12 its implementing regulation in 34 CFR Part 106, which prohibit  
13 discrimination on the basis of sex in any education, program,  
14 or activity operated by a recipient of federal financial  
15 assistance. As a recipient of federal financial assistance  
16 from the Department, the institution is subject to Title IX.  
17 Title IX and its implementing regulation contains several  
18 exemptions and exceptions from its coverage. See 20 USC §  
19 1681(a) 1 through 9; 34 CFR § 106.11, 106.15. See also OCR's  
20 web page on exemptions from Title IX. If the recipient intends  
21 to claim an exemption from the application of Title IX and its  
22 implementing regulation to this complaint, please contact the  
23 OCR staff member identified below. The recipient may do this  
24 before responding to the data request below."

25 Q Okay. When was that paragraph added to OCR's notice of

1 investigation letter?

2 A A portion of the paragraph -- the portion that -- it was  
3 added in September of 2021 -- the portion that I referred to  
4 now -- it begins with "Title IX and its implementing regulation  
5 contains several exemptions and exceptions from its coverage."  
6 That -- the remainder of the paragraph, from what I just read  
7 down, was added in mid-September 2021.

8 Q Okay. And did you participate in discussions about the  
9 addition of that paragraph?

10 A I did.

11 Q Why did OCR add that language in September of 2021?

12 A OCR added this language because we had received reports,  
13 through the enforcement directors, to me, to the then Acting  
14 Assistant Secretary, that we were receiving quite a few -- at  
15 least in the description of the regional offices -- a number of  
16 complaints that were very similar, that were coming sometimes  
17 on the same day, but they were coming within a short period of  
18 time to a number of our regional offices.

19 And under those circumstances -- as we have done in the  
20 past where we've had situations where we've had either single  
21 filers or even multiple filers all filing in what appears to be  
22 a group with very, very similar allegations based on  
23 identical -- not identical allegations -- but, in this case,  
24 they all appeared to implicate potential religious exemptions.  
25 We've had similar situations in the past when that has

1 occurred.

2 We have, first of all, decided that we need to have a  
3 consistent approach to how we deal with these complaints.  
4 Because they are coming to us in a number of our regional  
5 offices. We want to ensure -- as we do in every case -- but,  
6 in particular, in a situation like this -- that we're  
7 responding in a consistent fashion.

8 So we undertook a number of steps. One step was to add  
9 this language to the opening letters and going out in all  
10 Title IX actions so that we were sure we wouldn't miss any  
11 cases that had potential religious exemptions attached to them.  
12 We took other steps as well, but this was one of them.

13 Q Okay. Did OCR -- you said you "took other steps as well."  
14 What other process decisions did OCR make as a result of the  
15 influx of complaints potentially implicating the religious  
16 exemption?

17 A One of the first steps we took was to inform our regional  
18 offices that when they received more of these complaints --  
19 which I think we had gotten what we currently have -- when they  
20 received more of these complaints, they had to let  
21 headquarters -- make headquarters aware of the fact that they  
22 received those complaints and report that, "Today I received a  
23 complaint alleging whatever it was. It appears to involve a  
24 potential religious exemption." We needed -- we wanted to know  
25 that in headquarters. We wanted to see what was coming in so

1 that we could respond appropriately in a consistent fashion  
2 once we developed how we were going to do that response. So  
3 that was one step that we took.

4 Later -- not much later but somewhat later -- we  
5 instructed the offices -- some of whom had already reached out  
6 to schedule interviews with some complainants -- some of the  
7 clarifying interviews to which I alluded to earlier in my  
8 testimony -- we asked them to pause those interviews, which  
9 meant canceling them at least temporarily. We asked for a  
10 temporary pause on those interviews while we were considering  
11 the best way to approach these cases that were actually now  
12 growing in number. So that was a step we took. The pause was  
13 lifted after a short period of time and interviews went  
14 forward.

15 And we also -- after we didn't issue the initial directive  
16 to make us aware of these complaints when they come into  
17 headquarters, we -- in discussions at headquarters with the  
18 then Acting Assistant Secretary, we determined that, for  
19 consistency sake, we needed to -- whatever actions the field  
20 proposed to take with regard to these complaints -- whether it  
21 was an action to dismiss the complaint for any reason or to  
22 open the complaint for an investigation -- that had to be  
23 proposed to headquarters. And that actually had to be approved  
24 by -- and still does -- but, at that point, had to be approved  
25 by the Acting Assistant Secretary.

1 Q Okay.

2 MS. SNYDER: Beth, thank you. You can take down that  
3 exhibit.

4 BY MS. SNYDER:

5 Q So if I understand correctly, one of the process decisions  
6 that were made in September 2021, as a result of the influx of  
7 complaints potentially impacting the religious exemption, was  
8 the decision that the Assistant Secretary would be the final  
9 decision maker regarding the administrative complaints; is that  
10 correct?

11 A That's correct at that stage, yes.

12 Q And does the Assistant Secretary consider recommendations  
13 at a formal meeting of some kind?

14 A The then Acting Assistant Secretary -- we had a formal  
15 Title IX enforcement meeting at which we considered all of our  
16 Title IX complaints -- any particular Title IX complaints that  
17 we wanted to review as a group. We did, in one of those formal  
18 meetings, actually consider one of these complaints.

19 The current Assistant Secretary will still be reviewing  
20 these complaints and making the final determination as to  
21 whether the proposed dismissal should go forward or whether the  
22 proposed letter notification should issue. She will do that in  
23 consultation with me and with perhaps the enforcement directors  
24 whose offices are sending these proposals up.

25 And we have a meeting scheduled each week to discuss any

1 issues in headquarters. It may occur at that meeting, but it  
2 may occur on a more ad hoc basis. But we always involve and  
3 require the Assistant Secretary's assent or disagreement with  
4 what a proposal is.

5 Q Okay. So I think you told us under what circumstances OCR  
6 Enforcement might consider an assurance letter during the  
7 evaluation stage. Under what circumstances might OCR  
8 Enforcement not consider an assurance letter during the  
9 evaluation state and instead perhaps consider it during the  
10 investigation stage?

11 A Well, those would be circumstances where we simply don't  
12 know, in the evaluation stage, whether there's an assurance  
13 letter, but we learned later that there is an assurance letter.  
14 And that would be -- and when I say "later," I mean when we've  
15 opened the case already for investigation, we learned later  
16 that there is an assurance letter. We would then, of course,  
17 look at that assurance letter, look at the exemption that was  
18 assured, and make the same determination. Does the  
19 exemption -- does the regulation that is exempted -- is that an  
20 issue in the complaint before us? And if it is, we would  
21 dismiss at that stage.

22 Q Okay. So -- so I believe you said that if an assurance  
23 letter of religious exemption isn't covered by the allegations  
24 of the complaint, or, for instance, the investigator doesn't  
25 know whether the recipient has an assurance letter, then OCR

1 would send basically something substantially similar to the  
2 sample letter at Exhibit 2; is that correct?

3 A That is correct.

4 Q And that would open an investigation, which would be the  
5 Phase II of the OCR Case Manual; is that right?

6 A That's correct.

7 Q Okay. What happens if, once the investigation is opened,  
8 the recipient school comes in and requests an assurance of  
9 religious exemption letter?

10 A Well, actually, that's set forth in the letter I just  
11 read. "If the recipient institution intends to claim an  
12 exemption from the application of Title IX and its implementing  
13 regulation to this complaint, please contact the OCR staff  
14 member identified below. The recipient may do this before  
15 responding to the data request."

16 So if a recipient institution basically tells -- decides  
17 that it's going to request a letter of assurance from the  
18 Assistant Secretary, it's told that "you should let the OCR  
19 investigative staff member know, and you are then relieved of  
20 your obligation to respond to the data request that is attached  
21 to the letter of notification." We would then wait for the  
22 assurance process to be completed and whatever determination  
23 the Assistant Secretary was going to make before proceeding.

24 Q Okay. And if the Assistant Secretary does issue an  
25 assurance of religious exemption, what does the -- what does

1 OCR Enforcement then do in considering the pending  
2 administrative complaint?

3 A It does what it would do with any assurance of -- a letter  
4 of assurance of exemption. It would look to what particular  
5 regulation has the institution been exempted from. And if that  
6 regulation is at issue in the complaint before the  
7 investigative staff member, the investigative staff member  
8 would propose, at that point, dismissal on the basis of lack of  
9 subject-matter jurisdiction.

10 MS. SNYDER: Your Honor, I want to be mindful of the  
11 time. I have maybe two or three more questions on this point  
12 and then I shift to another topic. May I -- I know you wanted  
13 to complete at 8:00, I believe, or 5:00. May I finish the two  
14 or three questions?

15 THE COURT: Absolutely. I'm not rigid. That's fine.

16 MS. SNYDER: Thank you.

17 BY MS. SNYDER:

18 Q So in your 18 years with OCR, has it historically been  
19 true that a recipient school can request an assurance of  
20 religious exemption letter during the pendency of an OCR  
21 Enforcement complaint investigation?

22 A Yes, that is true.

23 Q And more generally, sort of the process that you've  
24 described about how OCR Enforcement considers a potential  
25 religious exemption in conjunction with a pending Title IX



1 complaint -- has that process in any way changed during your 18  
2 years with OCR?

3 A The process has not changed, with the exception of what  
4 I've described earlier. The addition of the language I read or  
5 pointed out in the letters of notification and the current  
6 requirement that any proposal to dismiss or any proposal to  
7 open -- at this point we're very early in all of these cases --  
8 be approved by the Assistant Secretary.

9 Q Okay.

10 MS. SNYDER: Your Honor, I can try to finish if you'd  
11 like, or I'm at a stopping point. I have probably another 15  
12 or 20 minutes, or I can stop, whatever the parties prefer.

13 THE COURT: The difficulty is going to be -- it's not  
14 going to help us much, because we're going to have to have this  
15 witness back. If I could take 15 or 20 minutes and the witness  
16 is finished, I would do that. But given the fact that I'm  
17 going to have to have him back, I think it's better to just  
18 stop now and give everybody a chance to regroup, and then we'll  
19 finish up on Monday.

20 MS. SNYDER: Thank you, Your Honor.

21 THE COURT: Here's the -- this is my -- I'm looking  
22 around at my people. We're going to all maybe regret what I'm  
23 going to say. But I'm thinking if we wanted to start at 8:00  
24 on Monday, which, you know, is easier for people who on the  
25 East Coast timeline, we could do that. I just -- I don't want

1 to -- I would like to make sure I have time enough to finish  
2 everything. And I'm a little edgy about what still remains.  
3 So we can start again on Monday at 8:00. Will that work for  
4 everybody?

5 MR. SCHAERR: We would welcome that, Your Honor.

6 MR. LIPPELMANN: Yes, Your Honor.

7 MR. SOUTHWICK: That works for Plaintiffs.

8 MR. GREY: Your Honor, this is Herb Grey. I do have  
9 a doctor's appointment at 8:00 o'clock, but I'm not necessary  
10 when the proceedings begin.

11 THE COURT: Okay. That's your point of view, but you  
12 may have it. Fine with us if you have your doctor's  
13 appointment.

14 Everybody else -- is that -- did I cover everybody that  
15 way? Does that make sense? And do people really think we'll  
16 finish by noon or maybe by -- at least by 1:00?

17 MR. SOUTHWICK: I think so, Your Honor. This is  
18 Paul. I think we will.

19 MR. LIPPELMANN: And, Your Honor, this is Mark  
20 Lippelmann for the Religious School Intervenors. I just want  
21 to let you know I will actually be in the air traveling on  
22 Monday. But my colleague -- Ryan Tucker -- will be in my  
23 place.

24 THE COURT: All right. And I know this witness is  
25 going to finish up, and there will be cross, et cetera. How

1 long do we think the witness for the Intervenor will be?

2 MR. SCHAERR: I believe about an hour of direct  
3 testimony, Your Honor.

4 THE COURT: All right. Well, we're in pretty good  
5 shape then. All right. We're going to recess now. I thank  
6 everybody for their attention. And I owe a debt of gratitude  
7 and apology to the court reporter, because I should have slowed  
8 the witness and the lawyer down. And I -- I always appreciate  
9 people who speak fast and much to the chagrin of the court  
10 reporter. So I thank her very much for a hard afternoon.

11 Everybody have a good weekend. Thank you for your time.  
12 And if there's something more you need to communicate, email us  
13 or let us know. We'll be set to go at 8:00 o'clock on Monday.  
14 Thank you for your time. We're in recess.

15 MS. SNYDER: Thank you, Your Honor.

16 MR. SCHAERR: Thank you.

17 MR. SOUTHWICK: Thank you, Your Honor.

18  
19 (The proceedings adjourned at 5:05 PM.)  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

Elizabeth Hunter, et al. v. U.S. Department of Education, et  
al.

6:21-cv-474-AA

PRETRIAL CONFERENCE

November 5, 2021

I certify, by signing below, that the foregoing is a true and correct transcript, to the best of my ability, of the video conference proceedings heard via video conference, taken by stenographic means. Due to the audio-visual connection, parties appearing via speakerphone or cell phone or wearing masks due to coronavirus, speakers overlapping when speaking, speakers not identifying themselves before they speak, fast speakers, the speaker's failure to enunciate, background noises and/or other technical difficulties that occur during video conference proceedings, this certification is limited by the above-mentioned reasons and any technological difficulties of such proceedings occurring over the video conference at the United States District Court of Oregon in the above-entitled cause.

A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Kendra A. Steppler, RPR

Official Court Reporter

Signature Date: 11/19/2021

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